

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE LARRY R. HICKS, SENIOR DISTRICT JUDGE
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4 ORACLE USA, INC., et al, :
5 Plaintiffs, :
6 -vs- : No. 2:10-cv-0106-LRH-VCF
7 RIMINI STREET, INC., et al, : September 28, 2021
8 Defendants. : Reno, Nevada
9 : Volume 7
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TRANSCRIPT OF EVIDENTIARY HEARING

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1 RENO, NEVADA, MONDAY, SEPTEMBER 28, 2021, 9:00 A.M.

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3
4 THE COURT: Good morning.

5 Have a seat, please.

6 All right. The record will show that we're
7 reconvened on Tuesday morning, September 28th.

8 This is our seventh day of trial, and I would
9 expect that the evidence would be finished today, but, in any
10 event, we're in the course of the examination this morning of
11 Mr. Lanchak by Mr. Liversidge.

12 You're welcome to go forward.

13 MR. LIVERSIDGE: Thank you, your Honor.
14 Good morning.

15 Good morning, Mr. Lanchak.

16 THE WITNESS: Good morning.

17 STEPHEN LANCHAK,
18 recalled as a witness on behalf of the Defendant,
19 previously sworn, testified further as follows:

20 DIRECT EXAMINATION RESUMED

21 BY MR. LIVERSIDGE:

22 Q When we finished yesterday we were talking about the use
23 of open code in providing updates for JD Edwards software, and
24 you mentioned that open code is modified at every stage of the
25 software's lifecycle. I'd like start by focusing on the
maintenance and support phase of the product life cycle.

1 MR. LIVERSIDGE: And if we could go to the next
2 slide in our slide deck, which is DDX-708.

3 BY MR. LIVERSIDGE:

4 Q Now, Mr. Lanchak, can you walk us through what is
5 reflected on this slide.

6 A Yes. From a support and maintenance perspective, what we
7 have here -- and I'll go from left to right -- is -- let's say
8 in course of normally conducting your business there are tax
9 law changes, and we've seen some of these already in terms of
10 year-end changes, like 1099 changes, W2 changes.

11 But there are also larger changes that happen, you
12 know, on occasion. For instance, in the past we've had the
13 Affordable Care Act, and, with what's being discussed in
14 Washington, who knows. I mean, Washington, D.C., might become
15 the 51st state. That's an example of some major changes that
16 would need to be made for these applications in the open layer
17 of the code.

18 But then you have other things that may be related
19 to the company's business strategy, for instance, they're
20 expanding globally which means they would need to add to their
21 chart of accounts, add new accounts.

22 Those new accounts might require additional business
23 functions that would need to be coded within the open layer of
24 the code to accommodate this new region that they're operating
25 in.

1 And, then, you know, other changes, for example, a
2 new distributor is added, and that new distributor may have
3 new or different processing requirements, functionality
4 requirements, that are necessary, and that would be a change
5 to the open code to add that new distributor and the business
6 functions associated with their work.

7 And then, lastly, I mean, innovation happens all the
8 time, new products are being added. A new product is added,
9 and there may -- there would likely be new vendors associated
10 with the manufacture of that new product, and there, again,
11 may be additional business functions that need to be coded
12 into the open accessible layer to accommodate, you know, that
13 change.

14 So that's a quick high level summary of the types of
15 maintenance and support events that you may have to contend
16 with.

17 Q And, Mr. Lanchak, do you have an understanding of whether
18 Rimini assists customers with the types of updates you have
19 just described in this slide?

20 A Yes, they do --

21 MR. HILL: Objection, foundation, your Honor.

22 THE COURT: Sustained. I think some greater
23 foundation is necessary here.

24 BY MR. LIVERSIDGE:

25 Q Mr. Lanchak, as part of your work in this case, did you

1 review the materials that the parties produced in deposition
2 testimony and interrogatory responses?

3 A I reviewed lots of documentation regarding what Rimini
4 does with regard to maintenance and support operations.

5 Q And have you sat through various parts of the testimony
6 during this proceeding?

7 A I have.

8 Q And based on your review of the materials and your
9 understanding of the testimony, do you believe you have a
10 general understanding of the types of support that Rimini
11 provides to its customers?

12 A Yes, I do have a general understanding of the types of
13 support that Rimini provides to its customer base.

14 Q Based on that, do you have an understanding of whether
15 Rimini assists customers with the types of updates that you
16 have described in this slide?

17 A Yes. As a third-party maintenance and support provider,
18 Rimini would do this kind of work for their clients.

19 Q And when you were working as a third-party support
20 provider yourself, did you modify and copy the open code in
21 supporting JDE along the lines described in this slide?

22 A I did.

23 Q Now, we've talked about it a little bit, but what is the
24 purpose of the tool image in this slide?

25 A Well, the tools -- I think I may have spoken about this

1 yesterday a little bit, too -- are provided by the software
2 vendor, JD Edwards, Oracle, to facilitate the access and
3 modification and copying of the code in that open layer to
4 bring about these changes that you need to be responsive to
5 your business environment, your regulatory environment,
6 et cetera.

7 And these tools, you know, essentially, support
8 the -- tools like Object Management Workbench in particular
9 support your ability to go in and create new code objects,
10 modify existing code objects, and properly promote those
11 objects through the various environments.

12 There's also another tool, too, that we haven't
13 spoken about yet that is called event rule language, which is
14 a tool that enables the user to actually create code without
15 programming it. It's called programmerless programming is the
16 slogan that's been used with it.

17 And it essentially is a tool that allows -- through
18 point and click allows the user to create code, and it also
19 uses wizards to aid the user in creating that code.

20 It's great for simple business functions. For the
21 more complex business functions usually you have to go into
22 the native C and do those C code and do those directly.

23 Q And are these tools that are provided used to implement
24 tax and regulatory updates into the JDE open code software?

25 A They are.

1 Q Mr. Lanchak, do you recall hearing testimony from
2 Ms. Frederiksen-Cross regarding Rimini's use of the JDE tools?

3 A I do.

4 MR. LIVERSIDGE: Let's pull up slide 37, if we
5 could, from Ms. Frederiksen-Cross's slide deck.

6 BY MR. LIVERSIDGE:

7 Q Mr. Lanchak, do you recall seeing this slide?

8 A I do.

9 Q And what is your understanding of Ms. Frederiksen-Cross's
10 contention in connection with this slide?

11 A Well, essentially that it would be unlawful to use Object
12 Management Workbench to work with the JD Edwards code.

13 Q And what is your reaction to Ms. Frederiksen-Cross's
14 contention that it is illegal to use the tools that Oracle
15 provides to modify the open code?

16 A It makes absolutely no sense that the software vendor
17 would provide tools for you, encourage your use of those
18 tools, facilitate your ability to use these tools to modify
19 the code, and then say it's illegal to use these tools. It
20 just flies in the face of common sense.

21 Q Did you use these tools when you were working with JDE
22 products?

23 A Yes, we did.

24 Q And is it your understanding that Rimini uses these
25 tools?

1 A Yes. That is my understanding.

2 Q In your experience, do other companies use these tools?

3 A Yes, they do.

4 Q Which types of companies are you referring to?

5 A Well, you have the direct competitors of Rimini, such as
6 Spinnaker and Support Revolution, but then you also have the
7 whole -- the rest of the ecosystem, including the application
8 support and maintenance providers, the systems integrators,
9 you know, companies that -- like IBM, Accenture, Capgemini,
10 Deloitte, PWC, Tata, Infosys, HCL. It's quite a long list.

11 Q And how about smaller firms, like mom-and-pop shops, do
12 they use the tools as well?

13 A Yes, they do. So, you know, there was some testimony
14 yesterday about SpearMC. That's a medium-sized company that
15 uses these tools. ERP Suites is another example of a smaller
16 JD Edwards integrator and support provider that uses the
17 tools.

18 And then you have, as I mentioned yesterday,
19 innumerable LLCs, you know, with a handful of people, that use
20 these tools in service of their customers.

21 And then, of course, as I said yesterday, too, the
22 independent third-party contractors, individuals, that hire
23 themselves out to work, you know, in a support and maintenance
24 capacity, or to work on a project, utilize these tools.

25 Q Now, Mr. Lanchak, you've testified that you've worked in

1 the industry for three decades; is that correct?

2 A That's correct.

3 Q And you had 18 years of working exclusively with Oracle
4 products; is that right?

5 A That's correct.

6 Q And you also testified that you were a trusted adviser
7 for over 60 senior IT executives, including CIOs and CTOs; is
8 that right?

9 A That is right.

10 Q And in the course of that work, you had many meetings
11 with Oracle in connection with these engagements; is that
12 correct?

13 A I did.

14 Q And based on that experience during your work in the
15 Oracle Enterprise software industry, did you ever have any
16 reason to believe that it would be unlawful to modify and copy
17 JDE open code using these Oracle-provided tools?

18 A None whatsoever. In all the meetings that I've had with
19 Oracle, with clients individually, innumerable meetings,
20 countless meetings, this was never even, you know,
21 conceivable.

22 Q Did anyone ever express to you that it would be unlawful
23 to modify and copy JDE open code using these tools?

24 A No.

25 MR. HILL: Objection, hearsay.

1 THE COURT: I'll allow the answer based on his
2 experience.

3 BY MR. LIVERSIDGE:

4 Q Have you ever seen any industry documents suggesting that
5 modifying and copying open code is unlawful?

6 A No, I have not.

7 Q In your opinion, from an industry perspective, would it
8 be reasonable to conclude that it may be unlawful to work with
9 these Oracle-provided tools?

10 A No, I wouldn't conclude that it is unlawful to work with
11 these tools.

12 Q Now, do you recall Ms. Frederiksen-Cross also testifying
13 that displaying this JDE open code was a violation of the
14 injunction?

15 A Yes, I do remember that.

16 MR. LIVERSIDGE: And let's pull up slide 38 from
17 Ms. Frederiksen-Cross's slide deck, if we could.

18 BY MR. LIVERSIDGE:

19 Q Now, Mr. Lanchak, do you recall seeing this slide?

20 A I do.

21 Q And what is your understanding of what
22 Ms. Frederiksen-Cross was contending in this slide?

23 A That it's a violation of the injunction and unlawful
24 whenever the code is displayed on the engineer's -- well, the
25 client or laptop or what have you, wherever they're using it

1 -- creates an in-memory copy, a RAM copy of the software, and,
2 according to Ms. Frederiksen-Cross's opinion, that's a
3 violation of the injunction and is unlawful.

4 Q And what is your reaction to that?

5 A Again, it's ludicrous. I don't understand how one would
6 be able to -- especially in a third-party support capacity --
7 perform the job that you're hired to do, without displaying
8 that code on your own workstation or laptop. It's -- it makes
9 no sense.

10 Q And when you were working as a third-party support
11 provider, did you display JDE open code when you worked with
12 the product?

13 A Yes, all the time.

14 Q And did you ever see your teams displaying JDE open code
15 when working with the product?

16 A Yes, all the time.

17 Q And based on your experience in the industry, during your
18 work in the Oracle Enterprise software industry, did you ever
19 have any reason to believe that it would be unlawful to
20 display JDE open code?

21 A No.

22 Q Have you ever seen any industry document suggesting that
23 displaying open code is unlawful?

24 A I have not.

25 Q In your opinion, from an industry perspective, would it

1 be reasonable to conclude that it may be unlawful to display
2 this JDE open code?

3 A No.

4 Q Now, Mr. Lanchak, do you recall hearing some testimony
5 from Ms. Frederiksen-Cross that she had never, in her history
6 of working in the industry, seen any reference to these open
7 and closed code terms?

8 A I do recall that.

9 MR. LIVERSIDGE: And let's -- John, if we can,
10 let's bring up that testimony from the transcript and just
11 walk through it quickly here.

12 BY MR. LIVERSIDGE:

13 Q So if we -- and this is at page 300 of the transcript,
14 starting at line 10, the question is,

15 "In your 45 years of experience, have you
16 ever heard of a distinction between open code and
17 closed code?"

18 And the answer is, "Not as it's used here,
19 no.

20 "QUESTION: Had you ever seen Rimini make
21 this distinction in any of its internal documents
22 prior to the time the injunction was issued?"

23 And the answer is, "I have not."

24 Do you recall that testimony?

25 A I do.

1 Q I think we have some additional testimony we can go to.

2 "QUESTION: Do any of the sources with which
3 you are familiar draw a distinction between open and
4 closed source code?

5 "ANSWER: I have not seen that distinction
6 written in that with respect to source code for -- in
7 its distinction for object code, only modules, ever,
8 in my entire career."

9 I think we have one more example:

10 "QUESTION: You testified that, you know, in
11 all your experience, you hadn't heard the term open
12 and closed code. Do you remember that?

13 "ANSWER: Outside this litigation?

14 "QUESTION: Yeah, outside this case.

15 "ANSWER: Yeah. Correct."

16 Mr. Lanchak, do you recall hearing that
17 testimony?

18 A I do.

19 Q What is your reaction to that testimony?

20 A That's hard to believe, frankly. The terms have been out
21 there. I believe I mentioned yesterday that analysts,
22 particularly Gartner, has used the terms in specific relation
23 to application maintenance and support, and there's also been
24 internal communications that I believe are entered into the
25 record from Rimini using terms open and closed code.

1 Q And you mentioned Gartner, what is Gartner?

2 A Gartner is an industry analyst. Gartner is probably the
3 preeminent source of comparative information in the industry.

4 Everyone subscribes to Gartner, relies on it. It
5 will rank the various, like, application support and
6 maintenance providers. It will rank systems integrators.

7 We are always trying to get as high a ranking in
8 Gartner as we could because the industry respects Gartner's
9 opinions. It carries a lot of weight.

10 And we would also meet with Gartner to talk about
11 what we are doing strategically with our practices, and they
12 would report on that, and then they would also talk to us
13 about their views on where they think the industry is going.

14 So we would have one-on-one meetings with Gartner.
15 They would meet with all kinds of third-parties, and then we'd
16 also, you know, pay a lot of attention to their publications.

17 Q And when you were working in the industry, did you use
18 and rely upon Gartner?

19 A I did, extensively.

20 MR. LIVERSIDGE: If I could, I would like to
21 bring up an industry publication from Gartner that starts with
22 the Bates numbers Oracle, ORCORST-00639707.

23 MR. HILL: Objection, your Honor. This document
24 is not in reference to any of Mr. Lanchak's reports and it
25 doesn't have an exhibit -- it's not on Rimini's exhibit list

1 either.

2 MR. LIVERSIDGE: Your Honor, this document was
3 produced from Oracle's files. It's been in production. It's
4 been in the case for years.

5 And Oracle has come in here and offered
6 testimony that essentially this distinction between open and
7 closed code is something that was essentially made up for
8 litigation purposes.

9 Ms. Frederiksen-Cross got on the stand and said
10 she's never heard of these terms, these terms don't exist in
11 the industry, and this was all offered on the fly, and we
12 would like to respond and to present the Court with documents
13 that do make the distinction.

14 It's true that the document was not on his
15 initial considered list, but he has looked at the materials
16 now based on that testimony. He was certain that these
17 materials are out there, and we think the Court would benefit
18 from seeing them.

19 THE COURT: The objection is sustained.

20 I struck all of the supplemental information
21 that was proposed for Ms. Frederiksen-Cross on motion of
22 Rimini, and my view is the same treatment should be applied to
23 the sources we're talking about here.

24 The objection is sustained.

25 MR. LIVERSIDGE: Thank you, your Honor.

1 Would it be -- if the document is not put into
2 evidence, is it possible to present it as something that the
3 witness has relied upon in coming up with his opinion? This
4 has been done with demonstratives and the like. It is
5 something that he's relied upon.

6 Even if not accepted into evidence, are we able
7 to present it with him?

8 THE COURT: No.

9 MR. LIVERSIDGE: Thank you.

10 BY MR. LIVERSIDGE:

11 Q Mr. Lanchak, during the time you worked in the Oracle
12 Enterprise software industry, was it your understanding that
13 it could be unlawful to modify or copy the closed code that
14 came with JDE?

15 A Yes, that's correct, and I believe that's spelled out
16 fairly clearly in the licenses that we -- we'd rely on that.

17 Q And based on your work in the industry, was it your
18 perception that others in the industry had the same view?

19 A Yes.

20 MR. HILL1: Objection, foundation.

21 THE COURT: I'll allow the question and answer.

22 BY MR. LIVERSIDGE:

23 Q The question, Mr. Lanchak, was it your perception that
24 others in the industry have the same view?

25 A Yes, it was my perception.

1 Q And did you instruct your teams, when you were working
2 with JDE software, not to work with this closed code?

3 A Yes. We would have these conversations often when we
4 were approaching the design phase, getting into the design
5 phase.

6 And what I would discuss with my teams is I would
7 use the terms, you know, "Let's not," you know, "access and
8 get into the core architectural code. You guys understand
9 this is not what we're supposed to do. Let's bolt on our
10 customizations through the accessible code," or exposed code
11 is the term I used to use with my team.

12 Q Do you recall testimony from Ms. Frederiksen-Cross that
13 closed source code is not made available to JDE licensees?

14 A I do remember that.

15 MR. LIVERSIDGE: And, John, maybe we can pull up
16 that testimony. It's at page 301 of the transcript, lines 15
17 to 25.

18 BY MR. LIVERSIDGE:

19 Q And the question here is,

20 "So no closed source code is made available
21 to JD Edwards licensees; is that right?

22 "ANSWER: That is correct."

23 And then it goes on from there. Do you recall
24 that testimony?

25 A I do.

1 Q And do you agree with Ms. Frederiksen-Cross?

2 A No, I don't.

3 This is rather artfully worded. Closed code is
4 supplied with every license. It has to be, that's what really
5 runs the application. So that closed code is compiled source
6 code, and every licensee needs to have it.

7 Q And so is it the case that every licensee, in fact, does
8 receive the closed code?

9 A Yes, absolutely.

10 And, also, let me say one more thing about that, and
11 I think this is an important point to get out there.

12 When we talk about object code and source code,
13 they're not really two different things. Object code doesn't
14 exist in and of itself. It has to have a source, and that
15 source is the source code.

16 So it's good to think of it as two sides of the same
17 coin. Where you have source code, you compile it, it's object
18 code, you have object code, you decompile it, and you have
19 source code.

20 Q So is the closed code provided in compiled form?

21 A The closed code is provided in compiled form, and
22 then the license specifically speaks that thou shall not
23 decompile, disassemble, or reverse engineer this closed code.

24 Q And as part of your work in the case, did you review the
25 OLSAs and Legacy JDE licenses?

1 A I did.

2 Q And did you hear Ms. Frederiksen-Cross's testimony that
3 the OLSA and Legacy JDE licenses contain that provision
4 prohibiting decompiling, disassembling, and reverse
5 engineering JDE code?

6 A Yes, I did.

7 MR. LIVERSIDGE: And maybe we can bring that up,
8 John.

9 BY MR. LIVERSIDGE:

10 Q And the question was,

11 "You're aware that the Oracle license and
12 service agreement has a restriction against
13 decompiling and reverse engineering?

14 "ANSWER: Yes, that's pretty standard in
15 software that's distributing object code only.

16 "And you're aware that JDE Legacy licenses
17 have the same?

18 "ANSWER: The ones I have examined all have
19 that provision."

20 Do you recall that testimony from
21 Ms. Frederiksen-Cross?

22 A I do.

23 Q And do you agree with her?

24 A Yes, I do agree with her. That is pretty standard.

25 Q And I think we have an example of one of the licenses

1 that you reviewed in coming up with your opinions and
2 conclusions, and that is OREX_67 which I believe is
3 preadmitted, if we can bring that up.

4 Mr. Lanchak, do you recall reviewing this particular
5 license which I believe is a JDE Legacy license with Giant
6 Cement?

7 A Yes, I do.

8 Q And is this one of the licenses that you reviewed as part
9 of your work in the case?

10 A It is.

11 Q And are the terms open and closed code used in this
12 license?

13 A The terms aren't specifically used in this license, but
14 the concepts are in this license.

15 And, again, it's important to just remember, open
16 and closed -- they're just labels that we're using. It's the
17 concepts which rely on the context of how the code is used
18 that is most important.

19 Q And does this license contain a prohibition against
20 decompiling or disassembling JDE code?

21 A It does.

22 MR. LIVERSIDGE: All right. Let's pull up
23 Section 71, if we could, John.

24 BY MR. LIVERSIDGE:

25 Q And, Mr. Lanchak, is this one of the license provisions

1 you were referring to?

2 A It is.

3 Q And this particular provision says,

4 "Customer shall not, or cause anyone else to:
5 Reverse engineer, disassemble, decompile, or
6 otherwise attempt to discover the source code of any
7 part of the software."

8 Do you see that?

9 A I do.

10 Q And is that one of the provisions you reviewed in coming
11 up with this case --

12 A Yes, it is.

13 Q Your opinions. I'm sorry.

14 A Yes, it is.

15 Q And do you believe this provision supports your opinions
16 in this case?

17 A I do. This provision is referring to the closed code,
18 that core architectural code that the software developer is
19 trying to protect.

20 And let's remember, back when these licenses were
21 originally written, usually in the late '90s, it was the wild
22 west in EOP market. New entrants were coming into the market
23 all the time.

24 Companies realized that they needed to protect their
25 intellectual property which was contained in that closed

1 layer, and these provisions became very, very common, and that
2 was the intent. We don't want anyone decompiling this code to
3 see how we did what we did, and then copying it in their own
4 software.

5 Q And is the closed code the code layer that needs to be
6 decompiled in order to access?

7 A Yes, absolutely.

8 Q And are there other provisions in this license that you
9 believe support your opinions?

10 A There are.

11 MR. LIVERSIDGE: Let's pull up provisions 1-ii,
12 and 7-iii, and 3.

13 BY MR. LIVERSIDGE:

14 Q And, Mr. Lanchak, just going back to my prior question to
15 clarify, is the closed code the code layer that needs to be
16 decompiled in order to access and copy the source code?

17 A It is.

18 Q Thank you.

19 Let's look at these provisions. Are these other
20 provisions that you reviewed in connection with coming up with
21 your opinions and conclusions?

22 A Yes, they are.

23 And the first one refers to access to the software
24 being allowed for,

25 "Independent contractors engaged by customer

1 who require access to the software to perform their
2 tasks."

3 Q And what about paragraph 7? What is it in that paragraph
4 that you believe supports your opinions?

5 A Yeah. And here it says,

6 "Customer shall not, or cause anyone else to
7 copy the documentation or software except to the
8 extent necessary...to support the users."

9 And the users are the ones that obviously are
10 utilizing the functionality of the software.

11 So it is supporting the need to go in and modify
12 and copy that open code portion of the software which is in
13 support of the users of the software.

14 Q And then if we look at paragraph 3, it says,

15 "For any access to the software other than by
16 an employee of customer, customer shall not provide
17 access to source code and all provided access shall
18 be restricted to screen access for the functions
19 required."

20 Now, is that a provision that you reviewed in
21 coming up with your opinions and conclusions?

22 A That is a provision I've reviewed, and that is how
23 third-party service providers work.

24 You're granted access, screen access, to the
25 functions that you need to perform. So that would mean, if

1 you're a contractor working on a support engagement or an
2 implementation engagement for a particular client, they're
3 going to grant you certain permissions, certain access to
4 certain portions of that sytem; i.e., the development
5 environment. You would not get access to the production
6 environment.

7 Conversely, if you're -- let's say you're
8 outsourcing their accounts payable function, and you're an
9 accounts payable clerk, you'll have screen access to the
10 production version, just the accounts payable function, that
11 you need to perform your job.

12 Q And, in your experience, do third-party support providers
13 provide JDE support through screen access?

14 A Yes.

15 Q And are third-parties able to modify and copy the open
16 code using screen access?

17 A Yes, they are.

18 Q And does a third-party have access to Oracle tools
19 through the screen access?

20 A Yes, they do.

21 Q And do you have experience, yourself, using screen
22 access?

23 A Yes, I've used screen access many times in my career.

24 Q And is that how you and your teams provided support for
25 JDE software when you were working in the industry?

1 A Yes, it is.

2 Q All right. Thank you.

3 Let's go back, now, to your summary of key reasons.
4 Let's go to DDX-709, and we're on key reason number 2, and you
5 indicate,

6 "Oracle has never before taken this position.
7 Oracle says the exact opposite and provides tools for
8 the specific purpose of modifying and copying JD
9 Edwards code."

10 And is that your second key reason, Mr. Lanchak?

11 A It is, absolutely.

12 In the 18 years I've spent working exclusively with
13 Oracle products and Oracle corporation, they have always
14 promoted the use of the tools.

15 In meetings I've had with them, and the
16 documentation that we would review, you know, on the Web,
17 related to JD Edwards, these tools are there.

18 There are even coding standards provided in the
19 description of these tools. It tells you, if you're going to
20 go into the native C code and make changes, you know, here are
21 the correct standards to use.

22 So, again, it's presenting that open layer of code
23 on a silver platter for the licensee and the licensee's
24 designates, and to now say it's illegal or unlawful or a
25 violation to use these tools, on the face of it, it makes no

1 sense.

2 Q Let's go to our next slide, which I think just provides
3 some key points in this area.

4 We've already talked a fair bit about the tools, but
5 what do you have in mind when you say "marketing and promotion
6 and customizations for clients"?

7 A Yeah. So regarding marketing and promotion, a big part
8 of my job, especially at MarketSphere, was working with Oracle
9 to come up with promotional campaigns for JD Edwards, and
10 those promotional campaigns often promoted customizations.

11 For instance, I have one in my report, an example,
12 where we had a promotional campaign together with a company
13 called DSI, Data Systems International. DSI had some
14 independent third-party application that they said if you
15 integrate this with JD Edwards, it's going to, you know, add
16 value, measurable business value to your environment.

17 So we would come up with our JD Edwards clients.
18 We'd invite them to these webinars. Oracle would reach out to
19 some of their clients, invite them to these webinars, and we
20 would make this pitch to them about, you know, hey, let us,
21 you know, serve you lunch and tell you about how we can add
22 this kind of value to your JD Edwards system through DSI and
23 the custom code changes we would need to make to utilize this
24 new application.

25 So we did that on, you know, many occasions, and,

1 you know, Oracle would be, you know, in the room with us when
2 we were holding these webinars.

3 And then customizations, this was something,
4 you know, we did all the time. Every time there would be
5 customizations.

6 And, you know, one example that I worked on where I
7 actually did the customizations myself, I designed and
8 developed them in RPG, was when the crude oil windfall profits
9 tax was enacted by Congress, and this is going back a ways,
10 but we were working with oil and gas exploration and drilling
11 firms that were on JD Edwards World at the time.

12 You know, this act comes down from Congress, it has
13 to be responded to, and JD Edwards at the time -- I forget the
14 reason, either they didn't have the bandwidth, or they felt it
15 was too small of a niche for them to respond to this, told
16 us -- and this is when I was with Arthur Andersen -- that we
17 should develop it for the customers.

18 So we developed a whole module to handle the crude
19 oil windfall profits tax, and then we sold that to additional
20 oil drilling and exploration companies mainly in the Texas
21 market.

22 So that's one example. Another example, more
23 recent, is work we did for the Renewable Energy Group in Ames,
24 Iowa, a bio-diesel producer. And we assessed their business
25 requirements as I described yesterday, and we selected JD

1 Edwards because we felt it was a good fit, but it still needed
2 a lot of customizations to accommodate the bio-diesel
3 industry.

4 For instance, we had to add field, fields to
5 existing screens, we had to add new screens that we -- and the
6 functionality for those screens, and this was all because they
7 had some fairly unique shipping requirements, multi-modal
8 shipping requirements for bio-diesel that required shipment
9 via rail, truck, both.

10 And then there were different types of requirements
11 for shipping the bio-diesel. You could do it by least cost,
12 preferred route, or you could allocate various percents to the
13 various carriers.

14 So JD Edwards obviously is not going to accommodate
15 bio-diesel shipping right out of the box. We had to build
16 that functionality onto -- bolt it onto the software through
17 that open code layer.

18 Q Okay. Thank you for that.

19 Shifting gears slightly now, Mr. Lanchak, are you
20 familiar with a third-party support provider named Spinnaker?

21 A I am.

22 Q Now, have you undertaken an analysis of Spinnaker's
23 processes as it relates to JDE support?

24 A No, I have not.

25 Q Have you reviewed materials in this case about

1 Spinnaker's support processes, including Spinnaker's
2 sworn statements and Oracle's testimony under oath regarding
3 those processes?

4 A Yes, I have. I believe there's Mathew Stava's
5 declaration, and also the Buffy Ransom deposition that I
6 reviewed.

7 Q And did you review those materials in coming up with your
8 opinions and conclusions in this case?

9 A I did.

10 MR. LIVERSIDGE: John, if we could pull up
11 DTX-733, which I believe is in evidence at this point, and go
12 to paragraph 14.

13 BY MR. LIVERSIDGE:

14 Q Mr. Lanchak, you indicated that you reviewed Mr. Stava's
15 declaration. Is this the declaration you were referring to?

16 MR. LIVERSIDGE: We want to go to the first
17 page, maybe, of that.

18 THE WITNESS: Yes.

19 MR. LIVERSIDGE: All right, and let's go to
20 paragraph 14.

21 BY MR. LIVERSIDGE:

22 Q And who is Mr. Stava according to your understanding?

23 A My understanding is that at that time, I don't know if he
24 still is, but he was the CEO of Spinnaker.

25 Q And if you look at paragraph 14 of Mr. Stava's

1 declaration, it says,

2 "Spinnaker Support develops fixes for its JD
3 Edwards customers. These fixes include product fixes
4 and operational work-arounds; updates, including but
5 not limited to tax and regulatory updates; and custom
6 code solution for its customers. Fixes, updates and
7 custom code solutions developed by Spinnaker support
8 may take the form of source code changes,
9 configuration changes, and data changes; or, may take
10 the form of a 'paper fix' or other instructional
11 document."

12 Do you recall reading that sworn statement from
13 Mr. Stava?

14 A I do.

15 Q And when Mr. Stava says,

16 "The fixes, updates, and custom code
17 solutions developed by Spinnaker Support may take the
18 form of source code changes, configuration changes,
19 and data changes,"

20 what is your understanding of what he means by that?

21 A Well, he's referring to Spinnaker's use of that open code
22 layer in JD Edwards. He's clearly not talking about the
23 closed code layer because that's prohibited by the licenses.

24 Q And did you see any response from Oracle concerning
25 Spinnaker's support processes?

1 A I did.

2 MR. LIVERSIDGE: And let's go to DDX-724, which
3 I believe is also admitted at this point, and we have on the
4 screen a letter from Deborah Miller, Vice-President and
5 Associate General Counsel of Oracle, to Mr. Stava.

6 BY MR. LIVERSIDGE:

7 Q Mr. Lanchak, did you review this information in coming up
8 with your opinions and conclusions?

9 A I did.

10 Q If we can bring up the -- and is it your understanding
11 that Oracle, along with its outside legal counsel, Bingham
12 McCutchen, conducted an audit on premises at Spinnaker of its
13 support processes?

14 A Yes.

15 Q If we go down in the letter it says,

16 "Based upon that review and the information
17 provided, we have determined that (a) Spinnaker's
18 current practices and procedures are respectful of
19 and do not infringe upon Oracle's intellectual
20 property rights and (b) do not violate Oracle's
21 license agreements with its clients."

22 And that's information that you reviewed in
23 coming up with your opinions?

24 A It is.

25 Q And do you believe that supports your opinions in this

1 case?

2 A I believe it very much supports my opinions.

3 Q Why do you say that?

4 A Because Oracle is essentially saying those things that
5 Spinnaker does to support and maintain JD Edwards, the things
6 that everyone does to support and maintain JD Edwards, that
7 those things that you do are respectful and do not infringe
8 upon Oracle's intellectual property rights.

9 Q And did you also review testimony from Oracle's corporate
10 representative regarding Spinnaker Support?

11 A I did.

12 MR. LIVERSIDGE: Let's bring this up, John, and
13 we'll go through it quickly. If we go to page 163, 12 to 15.
14 BY MR. LIVERSIDGE:

15 Q And the question here is,

16 "So does this paragraph contain an accurate
17 description of Spinnaker Support policies as they
18 were presented to Oracle during the 2011 audit?"

19 Mr. Lanchak, is it your understanding that in
20 the deposition Oracle was presented with Mr. Stava's
21 declaration and asked to respond to the paragraphs in that
22 declaration?

23 A Yes.

24 Q Let's go to our next testimony, which is 164, 4
25 through 10.

1 And Oracle's corporate representative was asked,
2 "And is it fair to say that Oracle concluded
3 that it was proper for Spinnaker to develop fixes,
4 updates, and custom code solutions for its customers
5 that may take the form of source code changes,
6 configuration changes, and data changes for its
7 clients in the manner described in this paragraph?

8 "ANSWER: Yes."

9 Did you review that information?

10 A I did.

11 Q Do you believe it supports your opinions in this case?

12 A I believe it does.

13 Q Why do you say that?

14 A Well, because this particular Oracle executive is saying
15 that the fixes, the updates, the custom code solutions, which
16 is what, you know, I've been talking about since yesterday,
17 that those would take the form of code changes and that that
18 is allowable and permissible.

19 Q In your view in this testimony, is Oracle essentially
20 saying the same thing you're saying?

21 A Yes, I think this is exactly what I've been saying.

22 Q All right. If we to our next testimony, which is 156, 3
23 through 10, the question is,

24 "Did Oracle conclude that Spinnaker's
25 processes do not infringe upon Oracle's intellectual

1 property rights?

2 "ANSWER: Yes.

3 "And did Oracle conclude that Spinnaker's
4 processes do not violate Oracle's license agreements
5 with its clients?

6 "ANSWER: Yes."

7 And this is information you reviewed?

8 A Yes, it is.

9 Q And you believe this supports your opinions?

10 A I believe it does.

11 Q Let's go back to our summary of key reasons, which is
12 DDX-711.

13 And your final key reason, Mr. Lanchak, that
14 you disagree with Ms. Frederiksen-Cross is that the
15 interpretation, in your opinion, would foreclose third-party
16 support for JD Edwards software; is that correct?

17 A That is correct.

18 Q And why do you say that?

19 A I say that because the definition of source code put
20 forth by Ms. Frederiksen-Cross would essentially result in
21 banning third-party support of JD Edwards software.

22 Q And, in your opinion, could Rimini support JDE if it did
23 not have the ability to create tax, legal and regulatory
24 updates?

25 A No, it could not.

1 Q And to your understanding, is the ability to create tax,
2 legal, and regulatory updates an important part of Rimini
3 Street support offering to clients?

4 MR. HILL: Objection, foundation.

5 THE COURT: I'll allow the question. I think
6 sufficient foundation has been established.

7 THE WITNESS: Can you repeat the question?

8 BY MR. LIVERSIDGE:

9 Q Yes, I can.

10 In your opinion, is Rimini Street's offering of tax,
11 legal, and regulatory updates an important part of the
12 offering that Rimini Street provides to its JDE clients?

13 A Yes. It's one of the key things that Rimini's clients
14 hire Rimini to do.

15 Q And could Rimini design, develop, and test tax, legal,
16 and regulatory updates without modifying and copying open code
17 in your view?

18 A No, they could not.

19 Q And could Rimini use the tools to develop and test
20 without modifying open code?

21 A No.

22 Q Could Rimini do break fix support without the ability to
23 modify and copy open code?

24 A Absolutely not.

25 Q What is break fix support?

1 A Well, break fix is what it sounds like.

2 You know, these software applications contain
3 millions of lines of code and things can go wrong, and when
4 they go wrong, it can be, you know, catastrophic.

5 So let me give you an example. So let's say you are
6 a staffing firm and you have thousands of third-party support
7 contractors that you need to pay. Your customers pay you, you
8 need to now pay the contractors that work for you.

9 And let's say it's a Friday, and you're running the
10 application -- the portion of the application that processes
11 payments for these third-party contractors, and all of a
12 sudden, inexplicably, it stops, it ends, it crashes.

13 If you're the CIO, you're immediately on the phone
14 with your support provider saying, "We have a Sev 1 issue,"
15 which means of severity 1 issue, "we need to get this fixed.
16 I have people expecting to get paid today that have bills to
17 pay. If they don't get paid this Friday, there's going to be
18 hell to pay. This is going to be bad. Get it fixed."

19 Well, you know, with break fix, immediately what
20 would happen is a support engineer would get on the system,
21 actually start looking around, exploring the database layer,
22 the application layer, infrastructure layer, and try and find
23 out what's going on here, what's going wrong.

24 And, you know, they're working at the speed of
25 thought basically, hands on the keyboard, doing exploratory

1 surgery on this application, trying to find the cause of this
2 break. Okay?

3 So if we take a step back and say, okay, based on
4 Ms. Frederiksen-Cross's definition of source code and what it
5 says is unlawful, what this now means is that this support
6 engineer, who would take the phone call and say, "Hmm, I
7 understand what you're saying. Hold on. I'm going to get the
8 first flight out. I'm going to fly to your site, because I
9 can't look at your code remotely, fly to your site," which may
10 be halfway across the country, "check into my hotel, then I'll
11 come over, and I'll look over your shoulder as you start
12 trying to find this issue."

13 Now, I'm going to tell you, that would be completely
14 unacceptable for that customer.

15 There are service levels that are negotiated in
16 these types of third-party support contracts, and a service
17 level means that if there's a break fix incident like this, it
18 has to be resolved in a certain period, short period of time.
19 If it's not, there are penalties.

20 And if these infractions happen too often, or there
21 are too many of them, I believe the client could, you know,
22 walk away from the contract.

23 So you have to be responsive to these types of
24 incidents if you want to stay in the third-party support
25 maintenance business.

1 Q Now, I take it from your explanation you heard testimony
2 during this proceeding that at one point Rimini had considered
3 an over-the-shoulder method?

4 A Yes, I have seen that.

5 Q And so, in your opinion, could Rimini have provided
6 meaningful JDE support going forward using an
7 over-the-shoulder method of support?

8 A No, they cannot.

9 Q And could Rimini, itself, even provide tax, legal, and
10 regulatory updates directly to customers using this
11 over-the-shoulder method?

12 A No.

13 Q Would Rimini have required customers to engage employees
14 or other third-parties to actually do the implementation?

15 A Well, see, that's the point. Because, you know, even if
16 it's a more mundane type of change, it's going to be
17 frustrating for that client to have to take someone that they
18 have doing some other job, put them at that computer with the
19 Rimini engineer over their shoulder, you know, telling them
20 what to do.

21 That's going to be frustrating because there's an
22 opportunity cost associated with that individual, the client
23 individual, sitting at that computer. They need to be doing
24 their normal day job, not doing Rimini's work.

25 So you could see it's going to be very frustrating,

1 and what would result is that customer would eventually look
2 for a way out of that contract with Rimini, or wait for the
3 expiration of that contract, and then go elsewhere for their
4 services.

5 Furthermore, you wouldn't get any new business --
6 let me repeat that -- no new business with that type of
7 approach. You would not acquire any more support and
8 maintenance contracts. No one would buy that service.

9 Q And during the time that you were working in the
10 industry, were you ever aware of any company that provided
11 ongoing maintenance and support for JDE using this
12 over-the-shoulder method?

13 A No.

14 Q Do you recall testimony from Ms. Frederiksen-Cross that
15 it would be prohibited for Rimini to remotely connect to its
16 clients to do the over-the-shoulder support?

17 A Yes, I do.

18 MR. LIVERSIDGE: And maybe we can bring that up,
19 John. I think it's at 543, lines 5 through 18.

20 BY MR. LIVERSIDGE:

21 Q And I think the question starts about on line 7,

22 "I wanted to touch up on one issue which is
23 you mention this concept of a Rimini engineer
24 standing next to someone who is allowed to look at
25 the code. And I wanted -- and I think you said

1 that's okay. Can a Rimini engineer do the same thing
2 remotely?

3 "ANSWER: I think that's a slipperier slope
4 because, if they're doing it remotely, at least a
5 video portion of the call, the only thing they can
6 have is on their remote machine at the time that they
7 reviewing, and so there is a copy of the code in a
8 form remotely on their machine.

9 "QUESTION: So they can't?

10 "ANSWER: I would think that would be
11 prohibited."

12 Do you recall that testimony?

13 A I do.

14 Q And so is it your understanding that
15 Ms. Frederiksen-Cross's view is that a Rimini employee
16 must literally be looking over the physical shoulder of its
17 client at the client's building in order to provide support?

18 A Yes. And that was what I was describing in my example of
19 break fix support, that a Rimini engineer -- or any
20 third-party support engineer -- needing to get on a plane in
21 the middle of a crisis to fly physically to that site to
22 physically look over the shoulder of the employee as they
23 would access modifying copy of the code, it's ludicrous.

24 Q And, in your opinion, would it even be feasible to have a
25 remote viewing access model with no ability to remotely access

1 and view the code?

2 A No, it makes no sense.

3 Q Do you recall testimony from Ms. Frederiksen-Cross that
4 she did not believe that paragraph 10 of the injunction would
5 be rendered superfluous by her interpretation of paragraph 8?

6 A I do recall that.

7 Q And do you agree with her?

8 A I don't.

9 MR. LIVERSIDGE: Now, maybe we can bring up -- I
10 think it's, John, page 4 of docket number 1459.

11 BY MR. LIVERSIDGE:

12 Q And here we have the two paragraphs of the injunction,
13 paragraph 8 and paragraph 10, and, Mr. Lanchak, why do you
14 disagree with Ms. Frederiksen-Cross?

15 A Well, paragraph 10 is alluding to third-party support
16 going on because it's really what I believe is called a
17 cross-use type of issue. So it's assuming that there's
18 third-party support.

19 Well, paragraph 8 essentially is banning third-party
20 support by prohibiting and making unlawful the copying of JD
21 Edwards software source code.

22 Q And when you say paragraph 8 is banning third-party
23 support, are you referring to Ms. Frederiksen-Cross's
24 interpretation?

25 A I am. Her interpretation of that is that that would

1 be -- that interpretation includes all code associated with JD
2 Edwards. And if you're going to say you cannot copy all code
3 associated with JD Edwards software support, you're
4 essentially banning third-party support of that application,
5 and that's not what paragraph 10 seems to indicate.

6 Q And does paragraph 10 contemplate development and testing
7 of JDE updates by Rimini?

8 A It does.

9 Q And would Rimini need to modify and copy open code in
10 order to provide development and testing of JDE updates?

11 A Absolutely. So I think -- in my opinion, it renders 10
12 superfluous. Yes.

13 MR. LIVERSIDGE: Thank you, Mr. Lanchak.

14 No further questions.

15 THE COURT: Cross-examination.

16 MR. HILL: Your Honor, may I approach with
17 witness binders?

18 THE COURT: Yes, sure.

19 MR. HILL: Good morning, Mr. Lanchak.

20 THE WITNESS: Good morning, Mr. Hill.

21 CROSS-EXAMINATION

22 BY MR. HILL:

23 Q Mr. Lanchak, you are not a computer scientist, correct?

24 A That is correct.

25 Q And understanding that you're not a computer scientist,

1 do you have an opinion on the definition of the term source
2 code?

3 A I do.

4 Q Would you defer to Mr. -- Professor Astrachan on the
5 definition of source code?

6 A My definition of source code is human-readable code, and
7 I believe, you know, he said something to that same effect.

8 Q And the closed code that you've talked about that
9 licensees receive when they get the JDE software, that's not
10 human-readable code, is it?

11 A It's provided in object code form, so --

12 Q So what the licensees receive is not human-readable code,
13 correct?

14 A It's not. It's compiled source code so it can be
15 converted to human-readable code.

16 Q When you say -- okay.

17 And, Mr. Lanchak, you're not an expert at
18 interpreting Oracle licenses, correct?

19 A I am not.

20 Q But you looked at a lot of JD Edwards licenses in
21 preparing your opinions, correct?

22 A I did.

23 Q And I think you mentioned this, but the terms closed code
24 and open code, those are not contained in any JD Edwards
25 license that you have seen, correct?

1 A That's correct.

2 Q And it's your opinion that it would be effectively
3 impossible to use, maintain, or support JD Edwards software in
4 a meaningful way without copying JDE open code, correct?

5 A That is correct.

6 Q And, in fact, it's your opinion that there's no level of
7 support that Rimini could provide to its JDE customers without
8 copying the JDE open code, correct?

9 A There's no level of meaningful support, I believe is what
10 I said, yes.

11 I mean, that's not to say they can -- they can
12 answer the phone and answer users' questions about how, you
13 know, something works. They can set up, you know, new user
14 IDs, perhaps.

15 But, I'm talking about meaningful support, those
16 types of serious items and significant items.

17 Q And as for tax, legal, and regulatory updates, it would
18 be effectively impossible for Rimini to create those without
19 copying JDE open code, correct?

20 A Yes.

21 Q And it would be effectively impossible for any
22 support provider to provide break fix support without copying
23 the JD Edwards open code, correct?

24 A Yes.

25 Q And it's your opinion that no support provider could

1 effectively provide support to JDE customers by remotely
2 viewing the customer's screen and providing that
3 over-the-shoulder support, correct?

4 A Based on the definition of source code that was put forth
5 by Ms. Frederiksen-Cross, yes.

6 Q And these opinions that you've just talked about, about
7 the inability to provide effective support, those are not
8 based on your analysis of the details of Rimini's support
9 offerings, correct?

10 A It's based on the -- my review of the materials in this
11 case and my experience working in the industry over all these
12 years.

13 Q But I think you testified yesterday that you haven't done
14 that detailed analysis of Rimini's processes --

15 A I have --

16 (Simultaneous indecipherable
17 conversation.)

18 MR. HILL: I'll ask my question again.

19 BY MR. HILL:

20 Q You haven't done that detailed analysis of Rimini's
21 processes and procedures to determine if it would be possible,
22 correct?

23 A That's correct, I haven't done a detailed analysis of
24 Rimini's processes and procedures. I wasn't asked to do that
25 as part of my task.

Q And you don't have an opinion on exactly what Rimini does

1 and doesn't do in terms of its JDE support processes, correct?

2 A Well, I haven't reviewed, as we just said, their -- I
3 haven't reviewed the specific processes and procedures that
4 Rimini does, but, I have worked in the industry quite a bit,
5 and I understand what Rimini does from the documentation I've
6 seen and from my industry experience.

7 Q But when you formed your opinions, you didn't even know
8 if Rimini provided break fix support, correct?

9 A That's not correct.

10 MR. HILL: Matt, could you pull up, from
11 Mr. Lanchak's June 2020 deposition page 181, line 16.

12 BY MR. HILL:

13 Q Mr. Lanchak, I asked you,

14 "Does Rimini provide break fix support to its
15 JD Edwards clients?

16 "ANSWER: Yeah. I haven't Rimini's specific
17 services so I'm not going to provide an opinion on
18 exactly what they do and don't do."

19 That's your testimony, correct?

20 A That is my testimony.

21 And what I'm saying there is that I wasn't going to
22 comment on that because I hadn't done that detailed analysis.

23 Q Mr. Lanchak, you're not an expert in tax, legal, or
24 regulatory updates for JD Edwards, correct?

25 A I'm an expert in understanding what tax, legal, and

1 regulatory updates are. I've been involved in applying those
2 updates, but I'm not an expert in creating those updates or
3 doing the research, the analysis necessary in understanding
4 what updates need to be created.

5 Q You've never designed and coded a tax, legal, or
6 regulatory update, correct?

7 A That is correct.

8 Q You talked about Spinnaker a little bit. Spinnaker is a
9 Rimini support competitor, correct?

10 A That is correct.

11 Q And you haven't done the analysis of Spinnaker support
12 processes, just like with Rimini's, to determine whether they
13 copy JDE open code when they support JDE customers, correct?

14 A I have not done that analysis of their processes, but I
15 have just relied on the sworn statement by Mathew Stava and
16 some of the other documentation I've seen.

17 MR. HILL: Matt, could you pull up DTX-733,
18 paragraph 14, again.

19 BY MR. HILL:

20 Q And this is the portion that you're referencing where
21 Mr. Stava says, in your opinion, that Spinnaker copies JDE
22 open code?

23 A Yes.

24 Q Okay. Now, in making -- in creating these updates
25 mentioned here, you don't know if Spinnaker actually

1 implemented those directly, or if the customer implemented
2 those with Spinnaker remotely providing support, correct?

3 A I don't know specifically how those were conducted,
4 that's correct. But I do -- can infer that Spinnaker, from
5 what I'm reading here, would be executing those changes.

6 I would think -- I'd back up that by saying that I
7 don't think Spinnaker would be as successful as they are today
8 if they were not making those open code changes themselves.

9 Q Can you identify any Spinnaker customers from 2011?

10 A Not offhand.

11 Q And so that means you don't know the terms of the license
12 of any of those Spinnaker customers in 2011, correct?

13 A Well, I've seen lots of JD Edwards licenses, and I know
14 they're going to be pretty standard from customer to customer.

15 Q But specifically, in 2011, you can't identify any license
16 for any of the Spinnaker customers, correct?

17 A If you're asking me specifically can I identify a license
18 between Spinnaker and one of its clients, no, I cannot.

19 Q Mr. Lanchak, what is an Oracle integration license?

20 A An Oracle integration license?

21 Q Yes.

22 A I'm not familiar with that term.

23 Q You have never heard that before?

24 A I don't recall what that would be.

25 Q All the companies that you work for in the industry, that

1 includes Accenture, KPMG, BearingPoint, HCL, they're all part
2 of the Oracle Partner Network, correct?

3 A That is correct.

4 Q ERP Suite, that company is part of the Oracle Partner
5 Network, correct?

6 A I believe they are.

7 Q SpearMC?

8 A I believe they are as well.

9 Q And if they're part of the Oracle Partner Network, that
10 means they all had a partner agreement in place with Oracle,
11 correct?

12 A Yes. I'm very familiar with those Oracle partner
13 agreements. They were primarily focused around business
14 development, and governed the payment of fees such as co-sale
15 fees and resale fees for the integrator that was facilitating
16 the sale of an Oracle license.

17 Q But you don't know the terms of any of those Oracle
18 partner agreements, correct?

19 A I don't recall the specific terms. We're talking a few
20 years ago.

21 Q And you don't know the terms of the Oracle partner
22 agreements for any of the companies in the JD Edwards support
23 ecosystem, correct?

24 A Can you repeat that question, please.

25 Q You don't know the terms of the Oracle partner agreements

1 for any of the companies in the JDE support ecosystem,
2 correct?

3 A I haven't seen their specific terms; that's correct.

4 Q And you mentioned I believe yesterday that many of the
5 big projects you worked for in JDE were integration projects,
6 correct, systems integration projects?

7 A It included integration and implementation, but there
8 were large elements of support and maintenance in those
9 engagements as well.

10 Q And you -- because you don't know the terms of the Oracle
11 partner agreements, you don't know if any of the entities that
12 you worked for, as part of their Oracle partner agreements,
13 had a license from Oracle, correct?

14 A Can you repeat that?

15 Q You don't know if any of the entities that you worked for
16 in the industry, as part of their Oracle partner agreements,
17 had a license from Oracle, correct?

18 A As I said before, I don't recall all the specific terms
19 in these agreements, but if we had a license for these
20 applications, I believe it would have been for our use of
21 those applications in the course of operating our business.

22 Q But, again, you don't know the terms of those partner
23 agreements, correct?

24 A I don't recall the detailed terms of those
25 partner agreements. As I said, they're more business

1 development-oriented and governed the payment of resale
2 or co-sale fees by Oracle to us for helping Oracle sell those
3 licenses. That's what I remember about them.

4 MR. HILL: Matt, could you put up tab 1, please.

5 This is tab 1 in your binder. At the very end
6 there's a series of tabs. This is the first one. This is a
7 document entitled Oracle Partner Network Policies.

8 Matt, could you go to page 6 under section C --

9 THE WITNESS: I'm sorry, Mr. Hill, what tab am I
10 looking at here?

11 MR. HILL: It's tab 1 in your binder. It's
12 towards the very end. It's after the depositions and --

13 THE WITNESS: Oh, tab 1. Okay. I thought you
14 meant the first tab.

15 MR. LIVERSIDGE: I'm sorry to interject. Your
16 Honor, can we get an exhibit number for this document?

17 MR. HILL: Your Honor, this doesn't have an
18 exhibit number. I'm not offering to admit it at this point,
19 I'm just establishing foundation.

20 THE COURT: Well, let's at least mark it for
21 identification in the event it is later referred to.

22 MR. LIVERSIDGE: Well, your Honor, they objected
23 to me showing the witness documents not on the trial exhibit
24 list. I don't believe this document is on their trial exhibit
25 list.

1 MR. HILL: This is cross-examination, your
2 Honor. This is not on our exhibit list.

3 THE COURT: I'll allow it for a limited purpose.
4 I'm not going to admit it.

5 MR. HILL: Understood.
6 BY MR. HILL:

7 Q Are you with me, Mr. Lanchak, on tab 1?

8 A Yes, I have it.

9 Q Could you look at page 6 under section C.

10 And do you see where it says -- this section C is
11 Application Programs, and do you see where it says,

12 "If you join the license and hardware track,
13 you may order an unlimited number of integration
14 licenses for use with your proprietary application
15 program as described in your OPM agreement."

16 Do you see that.

17 A Yes. Give me a second to just look at that.

18 Q Sure.

19 THE COURT: Mr. Smith [sic], I'm going to cut
20 you off here. He's previously testified that he's not
21 familiar with the terms, doesn't know the terms of the Oracle
22 partnership agreement.

23 I assume that what you're producing here is, in
24 fact, the current edition of the Oracle partner agreement, but
25 if he doesn't know it, he's not familiar with the terms, the

1 document hasn't been produced before, I'm going to cut you
2 off.

3 MR. HILL: Understood, your Honor.

4 BY MR. HILL:

5 Q Mr. Lanchak, that integration license mentioned in that
6 document, you're not familiar with that, correct?

7 A This specific license, I'm not. This is dated 2021, so I
8 wouldn't be familiar with this particular version.

9 Q Are you familiar with any version of an integration
10 license? I think you said before you hadn't --

11 A Oh, no. I thought you were talking about the partner
12 agreement. I'm sorry, the integration license, no, I'm not.

13 Q Okay. And you're not familiar with the terms of an
14 integration license, correct?

15 A As I said, I don't recall the integration license.

16 Q So you don't know if an integration license gives the
17 licensee the license to access and copy JDE open code,
18 correct?

19 A Well, what I'd tell you is, you know, there may be terms
20 for some of the larger providers that are in place currently.
21 I don't know if they were in place when I was dealing with
22 these systems.

23 But you also have a lot of these smaller providers
24 that are doing the exact same work, the LLCs that I talked
25 about, the independent third-party contractors that do not

1 have any of these provisions governing their use of the
2 software.

3 Q Mr. Liversidge asked you about the mom and pop shops.
4 You mentioned SpearMC and ERP Suites, correct?

5 A Yes. And then I also talked about the tier in the
6 ecosystem below that which would be these LLCs made up of
7 three, five, seven people that do the same modification work.

8 Q And ERP Suites and SpearMC, you mentioned they have an
9 Oracle partner agreement, correct?

10 A They may or may not. I do not know.

11 Q I believe --

12 A Oh, oh, I'm sorry. I thought (unintelligible) the
13 integration agreement.

14 Q No, just a partner agreement.

15 A Just partner -- yeah, I believe ERP Suites and SpearMC
16 does -- they both have a partner agreement.

17 Q And for those small, five- to seven-person operations,
18 you don't their license arrangements with Oracle or --

19 COURT REPORTER: I'm sorry, sir. Would you
20 repeat the question a little slower.

21 MR. HILL: Sorry.

22 BY MR. HILL:

23 Q Those smaller shops with the five to seven people you
24 mentioned, you don't have any understanding of their
25 arrangements or agreements, licenses with Oracle, correct?

1 A I don't specifically, but I have worked quite a bit with
2 them in the 18 years that I've been working with Oracle, and I
3 feel -- my opinion is that they do not, and I saw no
4 indication that they had any kind of agreements with Oracle
5 when I was working with them.

6 Q Well, you didn't work for them, right? You worked
7 for these --

8 A No, but I hired them on my teams, so they would be on my
9 projects.

10 Q But you wouldn't be privy to their contractual agreements
11 and negotiations with Oracle, correct?

12 A Well, as I said, specifically, I wouldn't. But being so
13 familiar with what they did, how they did it, and their
14 involvement on my teams, I feel pretty certain they did not
15 have any kind of documentation -- or agreements with Oracle.

16 Q But you don't know, right?

17 A I haven't specifically asked them that question in the
18 past.

19 Q Mr. Lanchak, it's not your view that Oracle's
20 interpretation of the injunction prevents JDE licensees from
21 copying the open JDE code, correct?

22 A I'm sorry, can you repeat that.

23 Q Yeah. It's not your view that Oracle's interpretation of
24 the injunction prohibits licensees from accessing the JDE open
25 code, correct?

1 A No, that's incorrect. It would prohibit them as well.
2 If it's unlawful, it's unlawful.

3 MR. HILL: Well -- Matt, could you bring up the
4 injunction, ECF 1166, paragraph 8.

5 BY MR. HILL:

6 Q As that's written, Mr. Lanchak, that doesn't prohibit a
7 licensee from accessing the JDE open code, correct?

8 A Well, I believe the injunction's purpose was to prohibit
9 unlawful conduct.

10 Q Well, let me just read it.

11 "Rimini Street shall not copy or access JD
12 Edwards software source code to carry out development
13 and testing of software updates."

14 So that only applies to Rimini Street, correct?

15 MR. LIVERSIDGE: Objection, calls for a legal
16 conclusion.

17 THE COURT: Sustained. And I would also state
18 that the words "or access" have been stricken from the
19 injunction.

20 MR. HILL: Thank you, your Honor.

21 BY MR. HILL:

22 Q But as you read this, this doesn't apply to a licensee,
23 correct? It only applies to Rimini Street.

24 A I see the words there, but, as I said, I believe the
25 injunction is meant to prohibit unlawful conduct, and unlawful

1 is unlawful.

2 Q Okay. In your interpretation -- well, assuming Oracle's
3 interpretation, have you seen any JD Edwards license that
4 prohibits the licensee from accessing the JDE -- from copying
5 the JDE open code?

6 A Repeat it, please.

7 Q Yeah. Under Oracle's interpretation of source code, have
8 you seen any license that prohibits the licensee from
9 accessing what you call JDE open code?

10 A I believe the licenses support the licensees and their
11 affiliates in supporting -- or in accessing and modifying and
12 copying that open layer of code, as I've said.

13 MR. HILL: No further questions, your Honor.

14 THE COURT: Redirect examination?

15 MR. LIVERSIDGE: Just very briefly, your Honor.

16 REDIRECT EXAMINATION

17 BY MR. LIVERSIDGE:

18 Q Mr. Lanchak, do you recall that counsel asked you about
19 whether the terms open and closed code were reflected in the
20 licenses?

21 A Yes, I do.

22 Q And you indicated that the actual terms open and closed
23 were not used. Do you recall that?

24 A I do recall that.

25 Q But are the concepts around these open and closed layers

1 of code reflected in the licenses?

2 A They are. And the point I want to make about open and
3 closed, they're mere labels. We can call opened and closed
4 whatever we want.

5 But the concepts -- which is what -- what is the
6 important point here, are reflected in the licenses as we
7 discussed.

8 Q And we looked at one of the licenses for JD Edwards, and
9 do the licenses have a prohibition on decompiling, accessing,
10 and ultimately copying the closed layer of code that you've
11 identified?

12 A That is correct.

13 Q And is there any prohibition that you've seen in the
14 licenses on copying the open code?

15 A No. There is no prohibition against that that I've seen
16 in the licenses.

17 MR. LIVERSIDGE: Nothing further, your Honor.

18 THE COURT: Anything further?

19 MR. HILL: Nothing further, your Honor.

20 THE COURT: All right.

21 That will conclude the testimony of Mr. Lanchak.

22 Let me inquire, what do you next anticipate on
23 behalf of Rimini?

24 MR. LIVERSIDGE: Your Honor, my understanding is
25 we have a few housekeeping matters to take up and to clean up

1 before we close, and then we'll be at the end of our case.

2 THE COURT: All right. Thank you.

3 And Mr. Smith do you know, at this point in
4 time -- I'm sorry, Mr. Hill, whether any rebuttal is
5 anticipated on behalf of Oracle?

6 MR. HILL: Yes. Oracle intends to call back
7 Ms. Frederiksen-Cross.

8 THE COURT: All right. Okay. Thank you.

9 We will take our morning recess at this time.
10 We will reconvene at 10:40 or shortly thereafter.

11 (A recess was taken.)

12 THE COURT: Have a seat, please.

13 The record will show we are reconvened after our
14 morning break.

15 And, Mr. McCracken, I see that you're up at bat
16 at this time so go ahead.

17 MR. MCCRACKEN: Yes, good morning, your Honor.
18 We just have a few evidentiary housekeeping matters before
19 Rimini rests its case.

20 THE COURT: Okay.

21 MR. MCCRACKEN: The first is that yesterday the
22 Court reserved ruling on Oracle Exhibit 68, but at this time
23 both parties have agreed that that should come into evidence,
24 and so we would offer Oracle Exhibit 68.

25 THE COURT: All right. It is admitted. I

1 appreciate your doing that.

2 (Plaintiff's Document Exhibit 68 received
in evidence.)

3 MR. McCracken: The second issue, your Honor, is
4 we have DTX-46, which is an excerpt of Ms. Frederiksen-Cross's
5 deposition testimony that was read into the record on
6 Wednesday, so we would offer DTX-46. There's no objection
7 from Oracle.

8 THE COURT: All right. It's admitted as well.
9 Thank you.

10 (Defendant's Exhibit 46 received in
evidence.)

11 MR. McCracken: The third issue is with regard
12 to DTX-733, which is a copy of the Mathew Stava declaration
13 that we've heard testimony about. Another copy of that is
14 already admitted, which is DTX-716, and so we'd offer DTX-733,
15 and there's no objection to that.

16 THE COURT: All right. It is admitted.

17 (Defendant's Document Exhibit 733
received in evidence.)

18 THE COURT: Is 716 already in evidence?

19 MR. McCracken: Yes, that's my understanding,
20 your Honor.

21 THE COURT: Okay. Go ahead, please.

22 MR. McCracken: And then, finally, we would
23 offer DTX-740, which is a copy of the transcript of the
24 deposition of Buffy Ransom that was played in court -- was
25 that Friday? Monday? In any event, it was played in court,

1 and there's no objection to that.

2 THE COURT: All right. It's admitted.

3 (Defendant's Exhibit 740 received in
4 evidence.)

5 MR. McCracken: And with those resolved, your
6 Honor, Rimini rests subject to Oracle's rebuttal case.

7 THE COURT: All right. Thank you very much,
8 Mr. McCracken.

9 MR. McCracken: Thank you.

10 THE COURT: Mr. Smith, are you at bat?

11 MR. SMITH: I'm at bat, your Honor. We recall
12 Ms. Frederiksen-Cross to the stand.

13 THE COURT: All right, thank you.

14 MR. SMITH: Welcome back, Ms. Frederiksen-Cross.

15 THE WITNESS: Thank you.

16 BARBARA FREDERIKSEN-CROSS,
17 called as a rebuttal witness on behalf of the Plaintiff,
18 previously sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. SMITH:

21 Q Let's get to it. Do you recall Professor Astrachan's
22 testimony that the Oracle copyrighted files and documents
23 found on Rimini's systems were isolated?

24 A I recall that testimony, yes.

25 Q And do you recall that he testified that he called these
files and documentation isolated either because they were few
in number or because they are separated from the PeopleSoft

1 environments?

2 A I do recall, yes.

3 Q Do you believe the Oracle files and documentation found
4 on Rimini systems were isolated in number?

5 A No, I do not.

6 Q Do you have a demonstrative showing the number of files,
7 Oracle copyrighted files, that you found on Rimini systems?

8 A Yes, I do.

9 MR. SMITH: And with your Honor's permission, we
10 would show slide 2 of her demonstratives which I have provided
11 a copy for the Court, too.

12 THE COURT: All right. You may do so.

13 BY MR. SMITH:

14 Q Can you walk us through this slide and your analysis of
15 the copyrighted files.

16 A Yes, just to refresh the testimony I gave the other day,
17 we initially searched for indicia of documents that contained
18 Oracle copyright. So this would be Oracle or PeopleSoft,
19 PeopleTools, JDE documents.

20 We did so using a text-based search that just looks
21 for the proximity of copyright with those words. That
22 research revealed 4,481 documents.

23 And then just to reduce that to a manageable number
24 for a more detailed review, we also filtered to include dot
25 txt files because we had seen evidence, for instance, of files

1 being renamed to txt when they're being transmitted to
2 Salesforce.

3 Similarly, we filtered for files beginning with OOP,
4 because that was used in some of Oracle's filing name
5 conventions, and we -- that yielded -- after that pass of
6 filtering, we had 1139 documents. This excluded .pdf files
7 and certain other types of files as well.

8 Q Okay. So with respect to the 1,139 documents, that
9 excluded .pdf files?

10 A Yes, unless they met the OOP.

11 Q And were other types of documents also excluded by that
12 initial filtering process?

13 A Yes. This was intended to exclude things like HTML
14 files, for instance, that would have been the results of
15 someone printing a support page, for instance, that was
16 publicly available but had an Oracle copyright.

17 And, similarly, if you had copied from a page like
18 that into a Word document, you know, because we didn't include
19 the Word file types, that would have been excluded as well.

20 Q And then can you describe the further filtering process
21 that's referenced here.

22 A Yes. Then we filtered specifically for the file
23 extensions that would have been related to source code as
24 well.

25 Q Okay. And so Professor Astrachan has opined that 844 of

1 the 934 documents that resulted from your filtering process
2 were uploaded to Salesforce by clients. Do you recall
3 evidence of that?

4 A I recall his testimony that he was told that and had
5 relied upon that number.

6 Q And do you know how that number was determined by
7 Professor Astrachan?

8 A It was through interview with Mr. Butler who I understand
9 to be a Rimini employee.

10 Q Now, assuming that that figure is accurate, that 844 of
11 the 934 documents were uploaded to Salesforce by clients, how
12 many documents does that leave, based upon your search, that
13 were not uploaded by clients?

14 A That leaves an additional 90 documents.

15 Q I would like to show you page 929, line 24, to page 930,
16 line 7, of the transcript from day five, which was Professor
17 Astrachan's testimony. And he was asked:

18 "Do you consider those 19 files sent to
19 Rimini by clients to be isolated?"

20 His answer was, "Yes. I call them isolated
21 because they're not part of any environment. Any
22 environment from which they came were the client's
23 environment. Rimini has no environments. So these
24 PeopleSoft files are isolated. They can't be
25 executed because Rimini has no PeopleSoft

1 environments. They can't be run. They can't be used
2 because they are isolated from the environments from
3 which they came."

4 Do you agree with that testimony.

5 A I think it ignores the fact that there are other forms of
6 use than running the software, for instance, looking at the
7 files in order to diagnosis a problem, or, if it's a
8 description of an Oracle fix, in order to understand, you
9 know, what Oracle was fixing and how it was fixed.

10 So I disagree with the characterization as these
11 being not -- not useable.

12 Q And do you have a demonstrative highlighting Rimini's use
13 of certain documents and files?

14 A Yes, I do, with the Court's permission.

15 Q And we'd like to display slide 3.

16 Can you briefly explain this slide and how the
17 exemplar files that you found on Rimini systems were used.

18 A These are files that I spoke about in my testimony
19 a few days ago. Psptaxdt.dms, this file was uploaded to
20 Rimini's system. It was opened, and the change log was viewed
21 in order to assess the version so that Rimini could help a
22 customer resolve a problem.

23 The PeopleSoft documentation that was sent through
24 Salesforce from -- by Texas General's -- Texas General --
25 Texas Children's Hospital, sorry, was then loaded to a share

1 file.

2 So it was initially sent to Tom Glazer, or provided
3 to Tom Glazer as an attachment, and then later moved to the
4 share file on Rimini's system presumably because someone
5 thought it was useful.

6 With respect to Evergreen Support, the file
7 psptcalc.lis, was a program listing that was provided by a
8 client to Rimini, and the Salesforce document indicates that
9 Rimini was able to identify the problem in one of its files
10 after reviewing this listing from the Oracle file that
11 happened to have an inclusion for that Rimini file.

12 And then, finally, the University of Oklahoma Health
13 Sciences Center tax files, again, the record shows that they
14 were reviewed for the purposes of diagnosing a problem with
15 the calendar year and where it was being picked up from in the
16 database.

17 MR. SMITH: Okay. We can take that down.

18 BY MR. SMITH:

19 Q Do you recall Mr. MacKereth's testimony from yesterday
20 that the Salesforce records you analyzed were flagged for
21 quarantined in some fashion?

22 A I do recall that testimony, yes.

23 Q Was yesterday the first time you heard of any such
24 practice by Rimini with regard to the files that you discussed
25 in your prior testimony?

1 A Well, in Mr. Astrachan's report, he had said he had been
2 provided information by Mr. Butler in a verbal conversation
3 that there had been some kind of quarantine, but yesterday was
4 the first evidence I had ever seen presented that was
5 represented to be associated with that quarantining.

6 Q And did you review the production history of the
7 SalesForce documents in this case following Mr. MacKereth's
8 testimony from yesterday?

9 A Yes, I did.

10 Q And did you reach any conclusions based upon that review?

11 A Yeah. It appears that the -- assuming, for a moment,
12 that that date change does, in fact, reflect the date that
13 these documents were quarantined, it appears that they were
14 quarantined at a point in time after Rimini had agreed to
15 produce those documents but a couple of months before they
16 were actually produced.

17 Q And do you know when Rimini agreed to provide the
18 SalesForce tables that you reviewed in this case?

19 A My recollection is that that was August 5th or 6th of
20 2019.

21 Q And do you recall when the SalesForce records that you
22 reviewed in this case were actually produced by Rimini?

23 A That was later in October.

24 Q And how many months after the injunction was issued were
25 the SalesForce records offered to be produced by Rimini in

1 this case?

2 A The original 2016 injunction or the confirmation of that
3 in November?

4 Q Let's go from the November 2018 date.

5 A That would be, I think, seven or eight months.

6 Q And let me move on -- well, let me ask you one final
7 question with respect to the Salesforce records.

8 We saw records yesterday that were indicated to be
9 modified by Ms. Maurya Priyadarshi. Do you recall that?

10 A I do.

11 Q And do you understand the dates reflected in the
12 Salesforce records, which I believe ranged from August 23rd to
13 28 of 2019, to reflect the date when she modified those files
14 in some way?

15 A That was my understanding from the testimony provided.

16 Q I'd now like to talk to you about the evidence presented
17 in this case regarding violations 4, 2, 3 and 10, which I
18 think have been loosely grouped together as kind of the
19 cross-use violations.

20 Are there some general rebuttal points that you
21 would like to make regarding each of these violations?

22 A Yes, there are.

23 Q And do you have a demonstrative outlining these general
24 rebuttal points?

25 A Yes, I do.

1 MR. SMITH: If we could show slide 4.

2 BY MR. SMITH:

3 Q Are these your general rebuttal points?

4 A Yes.

5 Q Can you explain these briefly, and then we'll get into
6 greater detail in a moment.

7 A Sure. With respect to the first point, you know, it is
8 my understanding that even if a particular client were in
9 scope, that the injunction prohibits the reuse of work done in
10 that client's environment to support some other licensee, that
11 the injunction really makes clear that it's solely in support
12 of a particular client's use that their environment can be
13 used.

14 Q And then how about number 2.

15 A There was some rather muddy testimony, I felt, yesterday
16 that seemed to conflate the delivery of software -- or of an
17 update to a client with development in that client's
18 environment, and this specifically focused on some of the logs
19 that were discussed where the file transfer and -- and the
20 creation of the upload folders, and so I'd like the
21 opportunity to clear that up.

22 Q Okay. So let's talk about your first general rebuttal
23 opinion regarding cross-use.

24 Do violations number 4 and 2 regarding Spherion,
25 Smead and Matheson Trucking illustrate this point?

1 A Yes, they do.

2 Q And do you recall that violations 2 and 4 concern the
3 form 940A, which involved credit reductions for businesses
4 with employees in the US Virgin Islands?

5 A I do, yes.

6 Q Do you recall testimony to the effect that because the
7 HCM200049 update for this credit reduction issue involved a
8 federal tax form, all states and clients were in scope to
9 receive the update?

10 A I recall that testimony.

11 Q And do you recall Mr. Bengé's testimony that because the
12 City of Eugene was part of a group of clients that were in
13 scope to receive the update, the update was first developed in
14 City of Eugene?

15 A I recall that testimony, yes.

16 Q Do you agree that the City of Eugene was in scope to
17 receive the HCM200049 update at the time Mr. Don Sheffield
18 first went into the environment associated with the City of
19 Eugene, and performed testing of that update?

20 A Not with respect to the specific problem that was being
21 worked on at that point in time.

22 Q And do you recall Professor Astrachan's demonstrative
23 regarding this timeline?

24 A Yes, I do.

25 MR. SMITH: And if we could show slide 5.

1 BY MR. SMITH:

2 Q And this is DDX-559. Do you recognize this as the
3 demonstrative from Professor Astrachan's direct testimony?

4 A I do, yes.

5 Q Was this timeline accurate in your opinion?

6 A In my opinion, it's both incomplete and inaccurate.

7 Q Have you created your own rebuttal timeline?

8 A Yes, I have.

9 MR. SMITH: And if we could show slide 6.

10 BY MR. SMITH:

11 Q Can you please explain your timeline with respect to this
12 violation, Ms. Frederiksen-Cross.

13 A Yes. What I think is significant that was omitted was
14 that well in advance of the activities that were being
15 discussed in that specific fix for the records we were looking
16 at yesterday, the IRS had already announced that that change
17 for 940A in the new box would apply only to businesses that
18 had -- or only to work being done in the US Virgin Islands,
19 and so that was in November 28th of 2018.

20 Subsequent to that, if we look at the Jira records,
21 we see that in January 15th, Ms. Gardner set the scope of the
22 Form 940, therefore, to include just Spherion, the client SPH.

23 Q And who is Laurie Gardner, to your recollection?

24 A My recollection is that she was the manager of the
25 business analysts group, and I don't remember her specific

1 title.

2 But she was the person who, as I understand it,
3 would be authorized to make those determinations of scope, and
4 to update the Jira record based on the facts that the business
5 analysts had determined in reviewing publications such as this
6 IRS announcement.

7 Q Okay. And then what happened next?

8 A On January 24th, rather than the 25th -- and this is the
9 one that I feel is in error with respect to Mr. Astrachan's
10 timeline that he showed, but the communications we reviewed
11 showed that Don Sheffield had already indicated on the 24th of
12 January before the scope got changed back to US -- so while it
13 was still only Spherion that he was testing in the City of
14 Eugene.

15 Q Okay. And then the scope was later changed after that?

16 A Right. On the 25th he changes the scope to the US rather
17 than Spherion to facilitate his distribution of that fix.

18 Q At any point in time in these proceedings, have you heard
19 or seen any evidence that the City of Eugene requested or
20 needed delivery of the HCM200049 update in January of 2019?

21 A No, I have not.

22 Q Let's assume for the sake of argument that the City of
23 Eugene was in scope to receive the HCM200049 update as of
24 January 24th, 2019, when Mr. Sheffield indicated that he
25 tested that update in the environment associated with the City

1 of Eugene, would that change your opinions in any way?

2 A Not with respect to whether or not that action appears to
3 violate the injunction.

4 Q And why is that?

5 A Well, again, as I understand the language of the
6 injunction, it prevents testing and problem diagnosis,
7 troubleshooting, in one client's environment on behalf of
8 other clients.

9 And so -- at least as I understand the wording of
10 this injunction, that would be something that was prohibited
11 to then subsequently distribute that solution more broadly on
12 behalf -- so that it was for the benefit of other clients
13 because now it's not work done solely on behalf of the City of
14 Eugene.

15 Q So is it your opinion that Rimini's development work in
16 client A, for example -- in the environment of client A, for
17 example, must be solely for the support of client A?

18 A That's my understanding of the injunction, yes.

19 Q And what is that understanding based upon?

20 A Well, I think we discussed the other day paragraph 4, for
21 instance, of the injunction with respect to PeopleSoft, and
22 paragraph 8 of the injunction.

23 Q You mean paragraph 6?

24 A Sorry, yes, paragraph 6.

25 MR. SMITH: Matt, can we display 4 and 6.

1 BY MR. SMITH:

2 Q And so what is the language within this -- within these
3 two paragraphs that you're relying upon?

4 A Well, in paragraph 4, you have the language that,
5 "Rimini shall not reproduce, prepare
6 derivative works from, or use specific licensees --
7 specific licensees' PeopleSoft software or
8 documentation, other than to support the specific
9 licensee's own internal operations."

10 So I find that language significant there.

11 With respect to 16, again, the prohibition
12 is,

13 "Reproducing, preparing derivative works
14 from, or using PeopleSoft software or documentation
15 on one licensee's computer system to support,
16 troubleshoot, or perform development or testing for
17 any other licensee."

18 Q Okay. And I think you said paragraph 16, but I think you
19 were referring to --

20 A Six, yes, Sorry.

21 Q Okay. But you would agree with me, wouldn't you, that
22 neither of these paragraphs use the word solely.

23 A The word solely doesn't appear in these. It talks about
24 a specific licensee's environment for the benefit of other
25 licensees."

1 Q Is there is other language in the injunction that you
2 rely upon to support your opinion that work for one client
3 must be solely for purposes of that client?

4 A Yeah. This was the PeopleSoft specific prohibition, but
5 in paragraphs above that, in the Court's injunction, the Court
6 used the word "solely" specifically. That would be, I think,
7 in paragraph 2A.

8 MR. SMITH: Okay. Can we take a look at
9 paragraph 2A.

10 BY MR. SMITH:

11 Q And take a look at this and tell us if this is the
12 language you're referring to.

13 A That's correct, "Unless solely in connection with the
14 work for a specific customer."

15 Q Okay. Now I would like to turn to a discussion of the
16 issue of scope with regard to violation number 3, and that's
17 the Johnson Controls W2 form issue. Do you recall that?

18 A I do.

19 Q With regard to violation number 3 and the values
20 associated with that print format box that was tested in the
21 City of Eugene, did you see or hear any evidence that the City
22 of Eugene was affected by this print format problem?

23 A No. I had seen no evidence that they had reported any
24 problem with that, or any evidence, even after the fact, that
25 they were necessarily affected by that.

1 MR. SMITH: Matt, I'd like to pull up Defense
2 Exhibit 302.

3 BY MR. SMITH:

4 Q And, Ms. Frederiksen-Cross, directing your attention to
5 the second page, I believe, of this exhibit, near the bottom
6 there's an indication that the issue experienced by -- it's
7 the second line down in this e-mail.

8 There's an indication that the issue experienced by
9 Johnson Controls, quote, "Could be a problem" --

10 "Could be a potential problem for all new
11 clients switching from tax960us to rsi960us who have
12 left the formatting field blank."

13 In your opinion, does the injunction allow
14 Rimini to use the PeopleSoft environment associated with the
15 City of Eugene, to test a fix for Johnson Controls, simply
16 because the problem, quote, "could be a potential problem for
17 all new clients"?

18 A Again, because they're doing that testing in order to
19 test something for hypothetical other clients, it seems to me
20 that that would be outside what was permitted under the
21 injunction.

22 Q Okay. Then I'd like to direct your attention back to
23 Oracle Exhibit 27, OREX_27, and the second page where
24 Mr. Sheffield included a screenshot from the PeopleSoft user
25 interface.

1 Does it matter, for purposes of your opinion,
2 whether the City of Eugene already had this print format
3 of B999999.99 in its PeopleSoft systems at the time
4 Mr. Sheffield entered into the system, or that he applied that
5 on the date that he tested the fix in the City of Eugene
6 environment?

7 A So just to be clear, you're asking whether it would
8 affect my opinion whether they already had it or whether they
9 were doing it on the fly as they were trying to figure out
10 this problem. No.

11 Q Yeah, that's correct. That was my question. And the
12 answer is?

13 A No, it doesn't change my opinion either way.

14 Q And why is that?

15 A Well, if they already had it, then they're making
16 reference to this environment in order to understand and
17 troubleshoot the problem to see what's different between the
18 two environments.

19 If, on the other hand, they were trying to work
20 through the problem, again, they would be trying to work
21 through that problem in the context of an issue that a
22 different client had reported, and, in either case, the City
23 of Eugene's environment was being used in order to
24 troubleshoot and resolve a problem for another customer.

25 Q Okay. I'd like to return back to slide 4 of your

1 demonstratives and talk about your second rebuttal point.

2 You indicated that there was some testimony that you
3 found to be muddled regarding the distinction between delivery
4 and development for a particular client; is that right?

5 A Yeah. There's one thing I would like to add in my
6 previous answer, though, if I may.

7 Q Sure.

8 A One of the things that struck me as particularly
9 interesting in that correspondence about the change to box 17
10 was, you know, this is a very simple change -- a comparatively
11 simple change. It may not have been simple to figure out, but
12 it was a simple change.

13 But, if you look at the correspondence in that
14 e-mail, this is an instance where it's very clear that you
15 can't say this was know-how of what the fix was, because they
16 spent several days trying to work out a fix for the client who
17 is having the problem.

18 Had this already been a known solution, even if it
19 was already in Eugene's environment, they would not have
20 needed to spend that time to be able to communicate to the
21 client.

22 So this is an example -- you know, there's been a
23 lot talk about know-how and what's know-how, and this is an
24 example where I think it illustrates that, very simply, that
25 this is a small change, but was something that was already

1 evidence that they were struggling to know how to fix this
2 problem, and actually using that environment to -- the
3 environment of the City of Eugene, to try to determine what an
4 appropriate fix for the other client would be.

5 Q So are you referring to the fact that this support case
6 for Johnson Controls, I think was opened a day or two earlier,
7 and Mr. Sheffield tried to apply different fixes before
8 arriving at this B999999.99 fix?

9 A Yeah, that's exactly --

10 MR. McCRACKEN: Objection. Leading.

11 THE WITNESS: But, that's exactly the point. If
12 you look in this e-mail, starting at the beginning of the
13 change --

14 THE COURT: Wait. Let me stop you. We have an
15 objection that the question was leading.

16 I'll allow the question because it appears to be
17 inviting an explanation from her -- at least that appears that
18 she was giving an explanation, so I will allow it with that
19 understanding.

20 THE WITNESS: Yeah, if you go to earlier parts
21 of this e-mail chain where you see the first days starting
22 at -- yeah, the bottom of the document. Okay, one page up.

23 You see that the initial correspondence took
24 place on the 23rd, and the client was, you know, "We really
25 need this fixed. There's a problem here that we're having."

1 And then if you go back through time here, there
2 are some, you know, proposed solutions.

3 If you go one more page forward in time -- so,
4 yeah, if you could blow that one up. So they're asking, you
5 know, what are they using to print it, what program are they
6 using? What are they on?

7 And then move forward in time a little bit
8 farther.

9 So here, they're starting to talk about what
10 they've done for some other client, HCR, and that maybe that's
11 going to be a fix, and this point in time it's still focused
12 on the box 14 fix.

13 And then go forward another roll in the e-mail
14 chain.

15 And so, again, they're still struggling to fix
16 the template. They're trying to change the underlying
17 template as opposed to the program at this point, And so this
18 is on the 24th, so a day later.

19 And now go forward a little bit.

20 And here's where they say they made a change in
21 the JHN environment, maybe that's going to fix it for them.

22 It also notes that -- you know, it gives some
23 additional information about interacting with the form fields
24 in this e-mail, but that's on the 24th again.

1 BY MR. SMITH:

2 Q And the change -- is it your recollection, did the change
3 to the templates work?

4 A The change to the templates did not -- well, it fixed one
5 problem, but it didn't fix the other problem. It didn't fix
6 the problem with the new box that was related to the Virgin
7 Islands.

8 And so several days have elapsed here as they try to
9 struggle to fix this. So obviously it wasn't a solution that
10 was already understood at that point.

11 Q Okay. So just to summarize this, why is it your opinion
12 that the work performed by Mr. Sheffield in the City of Eugene
13 environment on January 23rd -- or 25th of -- 24th or 25th of
14 2019, doesn't merely constitute the use of know-how?

15 A Well, it appears that Mr. Sheffield had the know-how to
16 know, for instance, where parameters are defined. But he did
17 not know with certainty that that was the specific fix here at
18 the outset of the problem or he would have communicated that.

19 And with respect to City of Eugene, whether they had
20 the variable already, and he was comparing Eugene's
21 configuration to the client reporting the problem, or whether
22 he was going there to test some things and see if this would
23 fix it, in either case, it's apparent he was using the City of
24 Eugene's environment in order to help troubleshoot and come up
25 with a fix for a different client --

1 Q Okay.

2 A -- which I understand to be prohibited under the
3 injunction.

4 Q Okay. Now, returning to your demonstrative slide 4, and
5 you indicated, I think earlier today, that there was some
6 muddled testimony regarding the distinction between delivery
7 and development. What did you mean by that?

8 A Well, I heard testimony that the Apply Update logs, for
9 instance, were evidence of testing, and I disagree very
10 strongly with that, those logs provide evidence of delivery of
11 the solution to an environment.

12 But I've looked at many, many, many of these logs,
13 and what they show is that essentially the package of the
14 software that is a particular update is delivered and
15 confirmation that that delivery was correct, so, in other
16 words, that the right objects were in the package and that
17 they are in the right place, but there is no testing shown in
18 those logs.

19 And I think there's a clear distinction between
20 sending something to a client and actually testing in that
21 client's environment.

22 Q Okay. And does violation number two with regard to
23 Matheson Trucking illustrate this point?

24 A It does.

25 Q If we could take a look at Oracle Exhibit 22, page 3 of

1 4, do you recall this exhibit, Ms. Frederiksen-Cross, whereby
2 Mr. Benge indicated to Mr. Pringle, quote,

3 "Hi, Tim. I have absolutely no indication
4 that HCM 20049 was developed or tested yet for MAT.
5 Has it been?"

6 Now, despite this e-mail, do you recall hearing
7 from Mr. Benge that this update was, in fact, developed in
8 Matheson's environment?

9 A I recall that he testified to that, yes.

10 Q I'd like to display the hearing transcript from day 4,
11 page 804, lines 9 through 21.

12 And is this the testimony that you were referencing,
13 Ms. Frederiksen-Cross, as being muddled?

14 A Yes. And here he's talking about the part of that
15 delivery record that shows the creation of the update folders,
16 that is to say creating a folder on the system that you're
17 going to be putting the update into, as evidence of testing.

18 And, again, that to me is very clearly a part of the
19 set up for the delivery, and he goes on to say, you know, they
20 ran the Transfer Files utility and moved the files from
21 Rimini's system to Matheson's development folders.

22 So they weren't on Matheson already, and they were
23 just being moved there, and this log that he's discussing --
24 I've reviewed that log several times. There is nothing in
25 that log to indicate development or testing there, merely that

1 the package was delivered there.

2 Q Okay. So with respect to Mr. Bengé's testimony here,
3 does the act of creating update folders to get the folder
4 structures all set up in the development environment for
5 Matheson, including collecting the before source code for the
6 program, have anything to do with development?

7 A No, that's just a part of the delivery process. They
8 create a set of folders where the code is going to be
9 delivered.

10 They create a before folder and take the client's
11 current version of the program and put it in the before folder
12 so that once they have delivered the solution, they are able
13 to verify that what should be in the after folder, if you
14 will, which is also created as a part of this process, is the
15 correct version of the file. But, it's not testing the file,
16 it's just a verification of delivery of the content.

17 Q Does the creation of update folders, including the
18 collecting the before source code for the program, have
19 anything to do with testing of this update?

20 A Only to the extent that you would test the update after
21 delivery, that that would be a, you know, a predicate step for
22 the delivery is to bring that content down to where you're
23 going to be testing it.

24 Q I think you mentioned this already, but did you review
25 the automation framework database records that were referenced

1 by Mr. Bengé in this testimony?

2 A Yes. He mentioned specifically the portion of the
3 automation framework that creates the update folders, and then
4 a little bit farther beyond where you just highlighted, the
5 part that does the transfer files, that is to say that then
6 moves the folders from Rimini's system to those -- or moves
7 the update from Rimini's system to the folders that were just
8 created.

9 Q Do these records referenced by Mr. Bengé in his testimony
10 confirm any development or testing of the HCM200049 update in
11 the Matheson Trucking environment prior to January 28th of
12 2019?

13 A I would want to look at the date specifically on that
14 e-mail, but it certainly didn't confirm any testing prior to
15 the date of that e-mail.

16 Q Now, if Rimini had developed this update that we're
17 talking about, the HCM200049, in the environment of Matheson
18 Trucking, would there have been any need for Rimini to deliver
19 the update with the automation framework as referenced by
20 Mr. Bengé?

21 A Well, that was the point I made before. If it was
22 already there, you wouldn't need to move it there to check it
23 out there. If they developed it in that environment, you
24 would expect that it would be in that environment in the
25 developmental folders.

1 Q Okay. A couple of more questions. Do you recall
2 Ms. Davenport's testimony that there is no quality assurance
3 testing at what Rimini calls informal updates?

4 A I do recall that testimony, yes.

5 Q Based upon your review of Rimini's postinjunction support
6 practices, is Rimini's provision of informal updates a common
7 occurrence in your opinion?

8 A It appears to be. Anytime there's a bug to be fixed or
9 the customer needs some customization, it might result in an
10 informal update if they need it more quickly than waiting for
11 the future formal update.

12 Q Okay. I'd like to move to violation number 5 which has
13 been the subject of a significant amount of testimony.

14 Do you recall Professor Astrachan's testimony
15 regarding the psptarry.cbl, and rspcmpay.cbl files?

16 A Yes, I do.

17 Q Was there anything surprising to you about the
18 methodology that Professor Astrachan used to compare the
19 Oracle file with the Rimini file?

20 A There were a couple of things that surprised me about
21 that. One is that it appears he applied a different
22 methodology or a different process here than he used in the
23 Rimini II matter.

24 I mean, the steps he articulates are different in
25 what he says -- what he identifies as constraints or things

1 that his filtration would filter out were a different set than
2 before.

3 Q Okay. Anything else? You said a couple of things.

4 A Yeah. There was some vagueness in his -- is it possible
5 to put up the list that he used in this case?

6 Q Sure. So let's show slide DDX-512 which is already up.

7 Do you understand these to be the elements that
8 Professor Astrachan used for constraint filtering and analytic
9 dissection in his testimony in this case?

10 A Yes.

11 Q And how many elements are there?

12 A Five.

13 Q And now I'd like to show you paragraph 205 of his Rimini
14 II rebuttal report -- and Matt will pull that up for us.

15 And are these the elements Professor Astrachan
16 claimed -- strike that.

17 Are these the elements that Professor Astrachan
18 claimed to be needed for exclusion for purposes of substantial
19 similarity analysis in the Rimini II case?

20 A Yes, I understand these to be the elements he had listed
21 there as required for analytic dissection.

22 Q And how many elements are there?

23 A There are eight in this particular list.

24 Q In your opinion, did Professor Astrachan include elements
25 for exclusion during his testimony in this proceeding that are

1 not included in the prior list of elements he's referenced in
2 paragraph 205 of his Rimini II report?

3 A He did. If we could go back to the list that he referred
4 to in his testimony.

5 So there's a couple things that I don't see here in
6 the other list. And I don't know if it's possible to put
7 these up side-by-side, or one atop the other.

8 But, for instance, here he lists code constrained by
9 the syntax of the language, and I didn't see reference
10 specifically to syntax of the language in the list he used in
11 Rimini II.

12 Q Let's see if we can get paragraph 205 up side-by-side
13 with the demonstrative from this case.

14 A Yeah, Matt, we only just need the list from paragraph 205
15 I think.

16 Q Okay. So please proceed, Ms. Frederiksen-Cross. I think
17 you were talking about item one from Professor Astrachan's
18 demonstrative code constrained by the syntax.

19 A Yeah. He didn't appear to be citing to language syntax
20 in his analytic dissection he used in Rimini II.

21 And then looking at this list, I think he mentions
22 elements constrained by function, code constrained by software
23 function, I think that's essentially the same thing in
24 different words in all likelihood, similarly logic and
25 efficiency.

1 But then you get to code constrained by standard
2 programming terms, and I don't see any reference in the
3 other -- in the other list to standard programming terms, nor
4 do I think that this is something that would be particularly
5 reproducible unless you identify the language and what terms
6 you're talking about.

7 So there's -- this would be a difficult standard to
8 apply, I think.

9 And then the code constrained by standard
10 development conventions, again, I think here, while I don't
11 disagree that you would want to look at whether common coding
12 conventions are being used, I don't think that in and of
13 itself their use is necessarily dispositive of anything.

14 And you would want to look at them in the context of
15 the software because, if you're using a coding convention, for
16 instance, from one language, in a different language where
17 nobody does that, that would be something that I would want to
18 look at.

19 And similarly the -- you know, just saying standard
20 development conventions without identifying what those are
21 makes it very difficult to reproduce this work, and to perform
22 the analysis again.

23 Q Okay. Regardless of whether Professor Astrachan's
24 methodology involves five unprotectible elements, or eight
25 unprotectible elements, do you agree with his general analytic

1 dissection methodology?

2 A Again, I don't, because it seems to be adapted to the
3 specific instance of the matter before the Court here today,
4 rather than being a more broadly applied technique, and he
5 didn't cite any reference that I'm aware of for the use of the
6 specific steps he chose in either of these cases.

7 Q Okay. Let's talk about some of his specific criticisms.

8 So, first, Professor Astrachan complained about the
9 fact that you did not conduct your analysis using Oracle and
10 Rimini files, and this, again, is the psptarry file, and the
11 rspcmpay.cbl file.

12 He complained that you didn't conduct your analysis
13 using a fixed-width format. Do you recall that?

14 A I recall him discussing that, yes.

15 Q And what is a fixed-width format?

16 A What I understand him to be referring is to have compared
17 the two side-by-side using a fixed-width font such that each
18 character would necessarily occupy the same amount of real
19 estate on a line so you're comparing 80 character lines to
20 80 character lines.

21 But with a proportional font, a W, for instance,
22 is -- takes up much more real estate than, say, the lower case
23 i, and so you can't see as clearly the alignment of things
24 within the code.

25 Whereas if you used a fixed-width font, those

1 columns will line up vertically. If you put the code one over
2 the other, you're going to see the exact same alignment
3 throughout.

4 Q Okay. So after hearing Professor Astrachan's testimony,
5 did you repeat your analysis using a fixed-width format?

6 A Yes.

7 Q And did that analysis change your opinions in any way?

8 A The only thing it changed is I would retract the comment
9 about the one orphan flower on the end of that one comment
10 because after I looked at then in fixed-width format, I see
11 that they do both occur in column 72.

12 Q Okay. Was there anything else that you noticed after
13 conducting your fixed-width format analysis?

14 A Actually, I noticed a couple of other similarities that
15 are an unconstrained visual aspects of how the code is
16 presented, that is to say, other unconstrained issues with
17 respect to alignment.

18 Q Okay. Let's stick with the fixed-width format here for
19 one more minute.

20 Did you assess Professor Astrachan's testimony that
21 the Rimini flower boxes uniformly start with a back slash
22 asterisk rather than an asterisk?

23 A I'm sorry. Are you asking was I aware of that testimony
24 or did I --

25 Q Did you consider it?

1 A I considered it, but it's not accurate.

2 Q Okay. So let me refresh everyone's recollection by
3 showing the transcript at page 951, lines 7 through 18.

4 And in this transcript portion, Professor Astrachan
5 testified that they uniformly, the beginning of the flower
6 boxes started with a slash asterisk on the top line.

7 Do you agree with that testimony?

8 A No, I don't. I mean, he goes on at the bottom of the
9 page here to say the convention is followed throughout the
10 file, but that is inaccurate.

11 Some of the comment boxes in the Rimini file start
12 with the slash asterisk, some start on the first line of the
13 comment box just with an asterisk.

14 Q And do you have a demonstrative highlighting some of
15 those examples?

16 A I do. I think there's actually a couple of them.

17 Q Could you walk us through, briefly, slides 9 and 10 from
18 your demonstratives.

19 A Yes. Just to orient here, so when we are looking at the
20 bottom box on the left, you see that the first flower box
21 starts with a slash asterisk. That's what we're talking
22 about. The slash is on the first line of the top of the box,
23 and then if you look at the bottom of the flower box, it's all
24 asterisks.

25 But if you look down the page to the SQL

1 communication, that line starts with -- the top line starts
2 with a flower box, and this is on the Oracle code.

3 When you look across to the Rimini code, you see the
4 exact same two comment boxes with the exact same flower box
5 annotation style, the exact same comments, and, of course, the
6 exact same alignment of those comments within the flower box.

7 Q Okay. And so why is this significant to you that these
8 two files have consistent different starting characters for
9 flower boxes?

10 A Well, it's one more example of a difference that, if it
11 occurred once in a program, might arguably be considered to
12 be, you know, coincidence, you know, somebody mistyped or
13 something, but, we see several of these throughout the
14 program.

15 And, again, it's not obviously the process -- or the
16 product of this particular developer's habitual practice
17 because they're inconsistent with it.

18 And it's another unexplained similarity between the
19 two code files between the Oracle psptarry file and the
20 rscmpay file.

21 Q Did you discover other unexplained similarities after
22 conducting your fixed-width analysis?

23 A There are several, yes.

24 Q And could you describe those for us, please.

25 A Well, for instance, if you -- just on the screen that we

1 have up right now, you'll notice that the word copy is aligned
2 roughly under the "U" in "function" on both sides.

3 That is to say copy occupies this -- it has been
4 aligned to the same alignment.

5 Now, I don't dispute that programmers like to kind
6 of line those things up, it makes the program a little
7 visually cleaner. But there's no constraint on where they
8 line them up.

9 I heard Professor Astrachan say that Cobol is a
10 column-driven language, but that's really only true with
11 respect to the first six characters or a sequence.

12 The seventh character can be used to indicate
13 continuation or a comment, and then columns 8 through 11 are
14 reserved for certain types of things can start in those
15 columns.

16 But then once you get into the main segment of the
17 line, until you get to column 72, there are really no
18 requirements of any form for how you line things up within
19 that real estate.

20 Column 72 on are then required -- are then reserved
21 for other things within the language like some
22 machine-generated sequence numbers, for instance, which goes
23 back to the old days when COBOL was being done on punch cards,
24 because in COBOL a line can only be 80 characters wide unlike
25 some other languages that give you more latitude.

1 Q Okay. So do I have it correct that respect to COBOL
2 programming you can really only use the seventh through the
3 72nd portion of the page in terms of if they are all columns?

4 A Right, right.

5 Q And is it your understanding that all of the copy words
6 appear or start in the exact same column?

7 A Oh, it's not true that they do everywhere throughout the
8 program, but in these specific instances they do, again, in
9 association with these other similarities.

10 Q Were all PIC and column and comp and value statements --
11 or were there other statements that were all aligned in the
12 same columns?

13 A There were. The PIC statements were consistently aligned
14 in column 39. And do we -- I think I have an example of that
15 in my demonstrative unless we ditched that slide.

16 Q We have the next slide which is the analytic dissection
17 slide, the last one.

18 A Okay. We threw that one away then.

19 So, yes, in all of the PIC statements, which in
20 COBOL is how you describe what the data type going to be -- so
21 you say PIC, and then you give it an indicator to say if it's,
22 for instance, numeric or alphabetic or alphanumeric in the
23 length the field.

24 All of the PIC words were aligned in column 39, and
25 then all of the value words were aligned in column 51, and

1 then all of the comp -- one of the alignment issues that
2 Dr. Astrachan pointed out -- were aligned in column 63 if I'm
3 remembering the column numbers correctly.

4 Q And assuming you remember the column numbers correctly,
5 why is that of significant to you?

6 A Well, again, although I wouldn't dispute that a
7 programmer might align things visually to make the program
8 easier on the eye, there is no constraint in COBOL as to what
9 column you would choose for that.

10 And so, again, the fact that both of these programs
11 selected exactly the same column for their alignment is,
12 again, something I would take into consideration when
13 evaluating the similarity between these files, and, it's one
14 more piece of that evidence that makes it clear to me that
15 either one file -- that the rscmpay was either copied from
16 psptarry, or that there is some common ancestor with psptarry
17 with the Oracle file.

18 Q Do you recall Professor Astrachan's testimony regarding
19 the spacing irregularities seen in both the Oracle file and
20 the Rimini file?

21 A I believe so, yes.

22 Q And do you agree with Professor Astrachan that the
23 spacing irregularities in both files is not indicative of
24 copying?

25 A In this particular instance, I do not.

1 MR. SMITH: And, Matt, can you pull up Professor
2 Astrachan's demonstrative on spacing, which I think is
3 DDX-538. Yes.

4 BY MR. SMITH:

5 Q Now, do you recall that Professor Astrachan testified
6 with respect to this demonstrative that there are two spaces
7 between the word comp in both the Oracle file and the Rimini
8 file because of COBOL conventions to line up columns?

9 A Right. I had pointed out that this was an unusual, in my
10 opinion, difference with respect just looking at the spaces
11 themselves.

12 Generally, I think, programmers would have, for
13 instance, set up tabs or something to the extent they were
14 going to put things in fields.

15 And then he came back and explained that, oh, well,
16 that's just so that comp could be lined up.

17 But then -- and this illustrates what I was talking
18 about before about the use of all of the PIC statements being
19 lined up, and all of the value statements being lined up, and
20 then the comp statements being lined up.

21 And, again, it's not so much that they're lined up,
22 but that they're lined up in exactly the same place that I
23 find telling here.

24 Q So are you saying that the double space after zero, which
25 appears in both the Rimini file and the Oracle file, is a

1 function of the comp word aligning in both files at the same
2 spot?

3 A Yes. It is not a requirement of the COBOL language that
4 these things be lined up. It is not a requirement that they
5 be lined up in a particular column.

6 But, again, with respect to these two programs, that
7 double space has been added to allow it to line up in the same
8 columns throughout the code. So where necessary to do that
9 alignment to get it into the 63rd column, that's how it was
10 done.

11 Q Okay. And just for clarity, does the Oracle psptarry.cbl
12 file, and the Rimini rspcmpay.cbl file have the same general
13 alignment of 88 potential columns?

14 A There's only 80 potential columns.

15 Q Eighty, 80 potential columns.

16 A With respect to the data areas that are defined -- that's
17 these things that start with 01, 02, and 03, for instance,
18 yes, they do.

19 And they also do with respect to that example I
20 talked about the other day, the 88 level that's used to
21 provide a value in association with the data element.

22 Q That's why I was confused, 88 versus 80.

23 A Oh, yes. Eighty-eight is a particular reserve type of
24 COBOL value.

25 Q Okay. Let's go back to your demonstrative which

1 highlighted the substantial similarity between the Oracle file
2 and the Rimini file, which was your side-by-side comparison.

3 MR. SMITH: It's the last demonstrative, I
4 believe, and we can actually put this down. But let's just --
5 the 175 -- can we pull up 175 as a whole. There we go.

6 BY MR. SMITH:

7 Q Now, Ms. Frederiksen-Cross, you indicated during your
8 direct testimony that, as shown on the right-hand side of this
9 first page, the program description provided by Rimini was
10 important with the language that this augments TARRY. Can you
11 remind us why you thought that was important.

12 A Because the PeopleSoft TARRY, or TARRY, this is a
13 statement in the program written by the programmer who
14 developed this program, that is stating specifically that this
15 program was intended to augment functionality from the TARRY,
16 and it goes on to list one other function that it performs as
17 well.

18 But I thought it significant that the program itself
19 self-identifies as being a program that augments that
20 PeopleSoft TARRY program.

21 Q Is it your opinion that the rspcmpay file was copied or
22 derived from, in some way, the psptarry file?

23 A I think as an initial point, from the visual aspect, the
24 actual way the source code is arranged and laid out, it would
25 be my conclusion that this program started, in all likelihood,

1 as a copy of psptarry, or some file that itself had been
2 derived psptarry.

3 And then that with respect to the functional aspect
4 of the software, because software really exists in two forms,
5 it's its textural representation and then its functional
6 characteristics.

7 With respect to the functional characteristics, it's
8 an augmentation -- a modification or extension, if you will,
9 of the function that's provided by the Oracle PeopleSoft TARRY
10 program.

11 Q Okay. Do you recall Professor Astrachan's testimony that
12 it is important for programmers to follow convention?

13 A I recall that testimony, yes. I think he said he would
14 grade them down if they didn't.

15 Q And do you agree with that testimony?

16 A Not a hundred percent.

17 I think that, you know, there's kind of a fine line
18 there. Adhering to convention to a certain extent is valuable
19 to those who come behind you and need to maintain your code.

20 On the other hand, it can serve to stifle creativity
21 with respect to, for instance, trying new approaches, or
22 finding better ways to do something.

23 So, you know, it's not something I would say -- I
24 don't place the value on it that Mr. Astrachan -- or
25 Dr. Astrachan obviously does.

1 Q Okay. Do you recall Professor Astrachan's testimony
2 regarding the API, which was defense exhibit 500?

3 A I think you're referring to the documentation for the
4 Oracle API?

5 Q Yes.

6 A For this -- yeah, for the SQL interface that's used in
7 COBOL programs in Oracle to talk to the database.

8 Q And is this Exhibit 500? I believe it is.

9 A Yeah.

10 Q And Professor Astrachan indicated that this is a document
11 instructing COBOL programmers how to program for PeopleSoft;
12 is that correct?

13 A Yeah. It's a PeopleSoft-oriented document, so it's how a
14 programmer writing in COBOL in a PeopleSoft environment would
15 talk to this subprogram that's used in that environment to
16 talk to the database.

17 Q And do you recall Professor Astrachan identifying what he
18 considered to be conventional and constrained API naming
19 conventions?

20 A Yes. I believe he referred initially to the names at the
21 bottom of this page.

22 Q Okay. And what is the -- what does the bottom of this
23 page show?

24 A It's giving an example of the way in which one would call
25 an Oracle subroutine ptpsqr1rt.

1 So it gives an example of the parameters that that
2 subroutine was expecting and their order. So you see that
3 this -- when you call this program, you're calling it using
4 action -- in this particular instance with the full list,
5 "action, sqlrt, cursor, statement, bind-setup, bind-data,
6 select-setup and select data."

7 So it gives some examples of what that parameter
8 list would look like in terms of what the full set of
9 parameters could be.

10 Q Okay. Just so I have this straight, would you expect a
11 COBOL programmer operating in PeopleSoft to write into the
12 code, capital CALL ptpsqlrt using statement with the word
13 statement written out, s-t-a-t-e-m-e-n-t?

14 A Well, this is an example, so a programmer just -- these
15 parameters have to be provided in COBOL according to their
16 position within this list, but they don't have to have these
17 specific names.

18 So I would not necessarily expect that a programmer
19 would use statement spelled out in full. They might
20 abbreviate it, they might append a prefix to it, but it would
21 have to be -- it would have to occur in the list in this
22 order.

23 So this is an example of where some things are
24 constrained within interacting with this software, and other
25 things are not.

1 Q Okay. Does the Oracle file, the psptarry file, and
2 the Rimini file use these purportedly conventional and
3 constrained naming conventions consistently, in your opinion?

4 A Consistent with each other or consistent with this
5 example or --

6 Q Consistent with the examples that are provided in this
7 document DTX-500.

8 A They both use some of the same words. They both use some
9 different words.

10 And for example in the case of statement, they both
11 depart from this example, but they do so using identical words
12 to identify the statement type.

13 Q Okay. Can we direct your attention back to Exhibit 175,
14 which is your comparison, and is there an example of this, I
15 guess, shared inconsistency on page 20?

16 A Yeah. Here would be an example -- it's probably a little
17 easier to see if we were looking at the fully expanded
18 programs, one above the other.

19 But you see on line 589 on the left-hand side, we've
20 got that call ptpsqlrt using that would just looked at a
21 minute ago.

22 And, for instance, in the one that we were talking
23 about just a minute ago, statement, you see that in line 592,
24 both programs, instead of calling it statement spelled out
25 fully, they call it sql-stmt.

1 So here again they are doing something that --
2 they're conforming to the API, they have the list of
3 parameters in the same order which is required, but then they
4 depart from the example in what they're calling them, or what
5 they're calling those parameters.

6 Q Okay. Do you recall that Professor Astrachan spent a
7 significant amount of time going over one page of your code
8 comparison from this Exhibit 175?

9 A I do. I think it's where he was drawing the red lines is
10 what you're referring to?

11 Q Yeah. I'd like to -- yes, that's right.

12 And I'd like to go briefly over the other portions
13 of the code that you believe are important for purposes of
14 substantial similarity, and just ask you very quickly about
15 them.

16 So could you take a look at the bottom of page 5 to
17 the top of page 6, and do you recall Professor Astrachan
18 addressing this portion of your code comparison?

19 A I don't recall if he specifically addressed the
20 flower boxes, but I think his focus was on this 01 data level
21 S-YT -- or my focus had been on the 01 data level S-YTD, and
22 the name of these below that, the FETCH-YTD-SW, FETCH-YTD-END,
23 FETCH-YTD-START. I don't recall that he --

24 THE CLERK: I'm Sorry, Ma'am. You're going to
25 have to slow down.

1 THE WITNESS: Okay. It's FETCH-YTD-END and
2 FETCH-YTD-START, and I don't recall that he addressed those
3 lines in his testimony.

4 BY MR. SMITH:

5 Q And are those lines important to you for purposes of your
6 substantial similarity opinion?

7 A Again, this is something that the programmer had
8 coded in the Oracle code. They had chosen those names.

9 I think he might have alluded to the fact that YTD
10 is a common abbreviation for year-to-date. But, of course,
11 you don't have to use it in COBOL. You're not limited on the
12 length of your variable name, so it could have been spelled
13 out, could have been abbreviated.

14 But here is a case where an Oracle programmer has
15 coded -- has chosen to code this particular programming switch
16 and chose it within the S-YTD data structure and has chosen to
17 given it -- give it specific names for the values E and S.

18 So if that switch contains the value E, you could
19 say does this switch contain E if you were testing that value,
20 or you could say the name -- you could use the name that was
21 assigned FETCH-YTD-END.

22 And, similarly, if you wanted to see if it was at
23 the start of that process, you could test FETCH-YTD-START.

24 There's nothing that constrains the order that those
25 88 elements -- those 88 level elements need to be in the

1 FETCH-YTD-END or START, they just are assignments that are
2 associated with that particular data value.

3 There's nothing that controls the use and choice of
4 these particular names. This was something the programmer
5 chose to do this way, and we see the exact same code in the
6 Rimini file.

7 Q Is there any significance, in your opinion, to the fact
8 that line 139 in the Oracle file uses SQL-CURSOR, while line
9 140 in the Oracle file uses SQL-STMT?

10 A Well, if you recall looking back to the list of
11 parameters, you have to provide a cursor. It doesn't have to
12 be called SQL-CURSOR.

13 I think in the API document we were looking at, it
14 wasn't even consistent there. I think they give the example,
15 on the first page of cursor, and few pages later of an
16 SQL-CURSOR.

17 There's no example in that document of SQL-STMT for
18 the statement. But, that's how it's being used in this
19 context of this particular call to the subroutine is it's
20 being provided as the statement variable.

21 Q Okay. I'd like to direct your attention to page 16 of 57
22 of this Exhibit 175.

23 Is it your opinion that the portions of the code at
24 the top of the page are substantially similar?

25 A Again, those were -- again, it's a comment which is

1 neither required for constrained other than that you have to
2 indicate that a comment -- you indicate the presence of a
3 comment in COBOL by an asterisk or slash in column 7, so that
4 first position indicates it's a column.

5 But how many flower box -- how asterisks you put on
6 the flower box, that's not constrained. What you put in the
7 flower box, the actual description you're putting in there as
8 your comment, in this case, additional library function
9 parameter, is not constrained.

10 It could have been library function parameters, it
11 could have said more function parameters -- library function
12 parameters, or it could have been omitted entirely.

13 This is not functional code. It's just a
14 programmer's eye catch is what we used to call them, so that
15 when you're flipping through a listing, you can find something
16 more quickly.

17 Q Okay. Directing your attention to the bottom of page 18
18 and the top of page 19, is it your opinion that these portions
19 of the code are substantially similar?

20 A Can you -- you're saying the bottom of 18 and the top --

21 Q It's actually top of 18, my bad.

22 A Yeah. We're off the reservation here. Okay. Yeah, here
23 again, this is an example of a different kind of eye catch.
24 This is in the part of the program that's actually doing the
25 procedural logic of the program.

1 And so there's a couple of similarities here I'd
2 like point out. The first is just that the programmer, in the
3 case of Oracle, has chosen to put one of these flower boxes
4 that starts above and finishes below the name of a section.

5 But the two lines that start with AA, those are
6 actually functional code. Those are not a part of the
7 comment. They are a functional code that is being bracketed
8 on either side by this comment.

9 The names of those functions are at the discretion
10 of the programmer. So AA000-MAIN is what the programmer chose
11 to name this -- for initial part of the program that sets
12 forth the MAIN logic.

13 The choice to have a paragraph within that section,
14 AA000, again, that -- the choice of that paragraph name is
15 completely at the discretion of the programmer.

16 Now, I'll point out that it's not uncommon for a
17 programmer to use either alphabetic or numeric or a
18 combination of alpha-numeric characters to help navigate the
19 program.

20 So you often put things at the front of the program
21 would be identified as 000 whatever, or AAA whatever, and the
22 ones at the end of the program, you know, would be on the
23 other end, 999 or ZZZ.

24 And this goes back to the old days when you were
25 looking at programs on listings instead of on Glass so that,

1 you know, if I'm in the middle of the program and I'm on G,
2 and I want to find something that's referred to as M, I know I
3 go downstream, and if I'm on G, and I want to find something
4 that's referred to as D, whatever, I know I go upstream in the
5 listing.

6 But, again, that's a completely discretionary choice
7 of whether I append it with, in this case, two alphabets and
8 three numeric characters, or if I had used entirely alphabetic
9 characters or entirely numeric characters, or a single A and a
10 single number, all of that is discretionary choice for the
11 programmer.

12 Q Do you believe there's anything unusual about the fact
13 that this main section starts with this AA000 on page 18, but
14 then ends without reference to the AA000 in both the Oracle
15 file and the Rimini file on the next page?

16 A Yeah. What is unusual here, in my experience, is
17 normally --

18 Q Just for match reference, we're referencing lines 547 in
19 the Oracle code and 233 in the Rimini code.

20 A Yeah. And, Matt, is this any way you can get the AAA on
21 the same screen with the MAIN-EXIT there? It would be a
22 little easier to explain.

23 No, we want the EXIT statement. We're going to talk
24 about the EXIT statement here.

25 MR. SMITH: Right above that. There you go.

1 THE WITNESS: Yeah, where it says MAIN-EXIT.

2 So, again, the use of this MAIN-EXIT basically
3 indicates that it's a way of better illuminating that you have
4 reached the end of a section.

5 But typically programmers will give -- in my
6 experience, at least -- typically programmers will give that
7 exit the same name as the MAIN. So you would have, in this
8 case, AA000-MAIN, and you would set forth MAIN'S exit as
9 AA000-MAIN-EXIT.

10 Or if you had called -- you know, if your
11 program was named -- or if your function -- if that section of
12 the program was called something like that D000-FILE-RECOVERY,
13 then you would have D000-FILE-RECOVERY-EXIT, so that it was
14 always completely clear and evident what you were exiting
15 from. You know, that this was the bracket, if you will,
16 between the beginning and the end of an exit.

17 So I find it unusual that they have omitted the
18 alphabetic prefix here on line 547 on the Oracle side, and in
19 line 233 on the Rimini side, and instead they have both chosen
20 to just call the exit to that function MAIN-EXIT.

21 Q Okay. I'd like to turn to your demonstrative which is
22 your last slide, and it reflects page 29 of 57 of this Exhibit
23 175, and this is a page that Professor Astrachan spent a
24 significant amount of time discussing and applying his
25 methodology regarding analytic dissection to. Do you recall

1 that?

2 A I do recall that, yes.

3 Q And do you have some response to the analytic dissection
4 that Professor Astrachan performed?

5 A Yeah. I think, you know, he went perhaps a bit
6 heavy-handed on his red-lining tool here because he didn't
7 really appear to consider whether all of what he was excluding
8 on a particular line was subject to constraint or whether only
9 part of it was.

10 So, for instance, he drew a red line through the
11 first line here, the 888 on the Oracle side, that says
12 initialize select data of S-YTD, saying of course you want to
13 initialize your data.

14 But he ignored the fact that they were both
15 initializing the same data, so that the initialize -- I have
16 no problem saying that's good programming practice, you want
17 to initialize your data before you use it in COBOL.

18 But it's the similarity of what's being initialized
19 and what's being used in this particular call operation.

20 And, again, you know, when he got to line 890, he
21 drew a red line there saying, well, ptpsqlrt is required, and
22 it's not remarkable for a programmer to call the ACTION-FETCH
23 or ACTION dash FETCH, as is the case here.

24 But, again, he's not acknowledging that that is not
25 a completely constrained choice. That, really, as I had

1 testified the other day, as long as you present this list of
2 parameters in the same order, you have a great deal of
3 discretion about what you call them.

4 Q What does the highlighting reflect on this page or in
5 this demonstrative?

6 A Well, SQL-CURSOR -- if we go back for a moment to that
7 API document, or if you recall that API document, it was just
8 cursor spelled out. It was a single word without any prefix
9 in the API document.

10 So it says you need a cursor. You need a cursor.
11 It's a part of the API, but what you call it is at your
12 discretion.

13 And then the next line down at line 895, there is
14 nothing in that API that addresses the set FETCH-YTD-END,
15 setting that particular processing switch to true.

16 Because that's what's going on here. You're saying
17 I'm going to put the value of true in that processing switch,
18 and so that might be something that you would need to do in
19 your logic but you would not need to call this switch this
20 name.

21 Again, similarly, I think we've already talked about
22 SQL-CURSOR.

23 The next area down is the ZZZ-SQL-ERROR, and while I
24 agree with Dr. Astrachan that it's, you know, good practice
25 when you've interacted with a subroutine to check and see if

1 you had any errors as a result, the use of the exact same name
2 for the SQL-ERROR function is not constrained. That, again,
3 is a programmer choice. What are you going to call the error
4 routine that you're going to execute if you find an error in
5 this particular part of the program.

6 Q Do you consider all of the terms or language that you've
7 highlighted on this demonstrative to be creative expression?

8 A They are -- they are creative, or at least partially
9 creative. Like I said, you need a cursor to talk to this
10 thing. What you call it is up in the air.

11 You don't have to reference the word cursor in it at
12 all, but it wouldn't strike me as unusual for a programmer to
13 have cursor somewhere in the name.

14 So on the one that's SQL-CURSOR, you know, that one
15 is partially, partially suggested by programmer convention,
16 but the others, I think, are completely independent of any --
17 any constraint or convention actually.

18 MR. SMITH: Okay. Your Honor, I probably have
19 15 minutes, I would guess, left. I'm happy to proceed, or we
20 could break for lunch.

21 THE COURT: All right. Well, I assume that
22 there will be some cross-examination as well, so let's go
23 ahead and break for lunch, and we'll reconvene between 1:20
24 and 1:25.

25 (The noon recess was taken.)

1 RENO, NEVADA, TUESDAY, SEPTEMBER 28, 2021, 1:25 P.M.

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3
4 THE COURT: Have a seat, please.

5 The record will show we are reconvened following
6 our lunch break today, and we continue with the examination
7 and testimony from Mr. Lanchak --

8 MR. SMITH: Ms. Frederiksen-Cross.

9 THE COURT: I'm sorry.

10 MR. SMITH: Before we do that, your Honor, can I
11 just raise one housekeeping with you?

12 THE COURT: Yes, go ahead.

13 MR. SMITH: So I think I have maybe 15 minutes
14 left with Ms. Frederiksen-Cross. We have a significant number
15 of travel and other scheduling issues.

16 So with the Court's indulgence, and if possible,
17 I'm not sure it's even going to be possible or necessary, but
18 we would like to extend the day today past 5:00 so we can
19 complete closings and complete this hearing.

20 THE COURT: That's acceptable to me. I want to
21 do the closings in one sitting, and I would offer to do it
22 tomorrow morning or to do it this afternoon.

23 My preference would be to do it this afternoon
24 and run it as late as we need to run it.

25 MR. SMITH: Okay.

1 MR. VANDEVELDE: Your Honor, we would have no
2 objection assuming that it can be fit in. We did not
3 anticipate such lengthy cross-examinations and rebuttal case
4 from Oracle, so I think we're fairly deep into the day, but if
5 there's time, then I'm happy to do that as well.

6 THE COURT: Okay. Well, it sounds like we're on
7 essentially one page. I'd like to see it finish today, and
8 I'm sure -- I see a number of heads nodding so I can see what
9 the consensus is.

10 And, Ms. Frederiksen-Cross, you may be one of
11 the noddors, I just didn't notice, and please excuse me.

12 Mr. Smith, go ahead, please.

13 MR. SMITH: Thank you, your Honor.

14 DIRECT EXAMINATION RESUMED

15 BY MR. SMITH:

16 Q Ms. Frederiksen-Cross, did any of the testimony that you
17 heard from Mr. Bengé or Professor Astrachan change your
18 opinion that the files associated with the bundle update
19 RS18F07, which included the SQR and DMS files associated with
20 that update, are derivative works?

21 A No, nothing changed my opinion about that.

22 Q Was the RS18F07 update delivered to Easter Seals before
23 or after the injunction?

24 A It was delivered after.

25 Q And are you -- how do you know that?

1 A We see it from the e-mail -- I mean, with respect to the
2 specific instance that we were looking at yesterday, it was
3 delivered after as shown by the e-mail.

4 MR. SMITH: Okay. Matt, can we pull up Exhibit
5 90.

6 BY MR. SMITH:

7 Q Is Exhibit 90 the e-mail you're referring to?

8 A Yes, it is.

9 Q Other than this e-mail, are you aware of other evidence
10 that the rs11099i and rs11099m files, distributed as part of
11 this RS18F07 update, were further developed after November of
12 2018?

13 A Yes.

14 Q And what is that evidence?

15 A I've seen other copies of these files in the context of
16 the Rimini II case that have later modification dates. This
17 is a file that appears to be updated at least once yearly.

18 Q Okay. And can you please remind us of your opinion as to
19 why the SQR and DMS files associated with this update, as well
20 as the RS18F07 update itself, are derivative works?

21 A Sure. As a first point, as we've discussed before, these
22 files have no independent purpose outside the PeopleSoft
23 environment. They exist as extensions and modifications to
24 the PeopleSoft environment.

25 They rely for their operation on the framework and

1 infrastructure provided by the PeopleSoft environment, and
2 that would specifically be the PeopleTools, DMS Data Mover in
3 the case of the DMS scripts, and the infrastructure provided
4 by the PeopleSoft environment in the case of the SQR programs.

5 Q Okay. We've heard some testimony in this case about
6 #include statements. Is one of the bases for your derivative
7 works opinions the #include statement?

8 A Specifically the #include statements that include and
9 show that these programs rely on the Oracle infrastructure,
10 and then the use of things that come from those #includes in
11 the files.

12 Q Professor Astrachan has testified that almost every
13 program uses a #include statement. Do you agree with that?

14 A In some languages that would be true. Some languages use
15 a different form for that kind of reusable code.

16 Q And is it your opinion that every time there is a
17 #include statement in a software program the result is a
18 derivative work?

19 A No, not at all.

20 Q And why is that?

21 A Well, I'm drawing the distinction in my analysis between
22 those #includes that indicate a direct reliance on the
23 underlying Oracle PeopleSoft environment, for instance, as
24 opposed to a generic #include that just indicates that a
25 programmer is using some common reusable component that might

1 be a part of a language set or of services for the operating
2 system.

3 Q Do the #include statements within the Oracle software
4 files that you cite to as evidence of the file being a
5 derivative work incorporate protected expression into that --
6 into the compile code?

7 A Oh, they do when the code is compiled, yes, absolutely.

8 Q Now, Professor Astrachan stressed the point that the
9 RSI-1099 files, although containing the #include statements to
10 incorporate the PeopleSoft source code, they don't actually do
11 that until the source code is compiled or the software is run.
12 Do you recall that?

13 A Yes.

14 Q Does that have any impact on your opinion that the files
15 themselves are derivative works?

16 A No, those files are created specifically for use in the
17 context of the Oracle software, and, in fact, if you look at
18 what's in those files, even before they include the code
19 that's copied in from the #includes, they make reference to
20 that code so you know that those #includes are being used.

21 Q Okay. Let's take a look at the exhibit we were just
22 looking at, Oracle 90, and I'd like to direct your attention
23 to page 4 of this exhibit. What is page 4 of Oracle
24 Exhibit 90?

25 A That is one of the Data Mover scripts, the DMS files,

1 that was included as a part of this update.

2 Q And can you remind us why Data Mover scripts are -- what
3 they are and why they're important.

4 A Sure. Data Mover scripts are used in the context of the
5 database, so they allow you, for instance, to move or
6 modify -- move information into the database, to modify
7 information that's in the database, or to select and extract
8 information from the database for use by the program.

9 Q Are the Data Mover tools part of PeopleTools?

10 A That is correct, yes.

11 Q Can DMS scripts operate or be run without use of
12 PeopleSoft utility tools?

13 A No, they're designed specifically for interoperability
14 with the PeopleSoft environment, and they rely on that
15 environment.

16 Q Do you recall Mr. Bengé's testimony that the DMS scripts
17 associated with the RS18F07 update were written on Rimini's
18 systems without using Oracle's People's tools -- PeopleSoft
19 tools?

20 A I'm aware of that testimony, yes.

21 Q And do you have new reason to question that testimony?

22 A I do. There's really two principal reasons. One is that
23 these files could, of course, not be tested or verified to be
24 working accurately without having used a PeopleTools
25 environment, specifically a Data Mover environment, to test

1 them.

2 But the other one is -- if you could blow up this
3 window -- or shrink this window just a bit so we can see a
4 little bit more of the context, maybe half the page, or even
5 the whole page is fine.

6 As you see here, this file refers to Oracle
7 PeopleSoft tables, for instance, the PS_WTHD_CNTL_VNDR is the
8 name of a PeopleSoft table that was provided by Oracle as a
9 part of PeopleSoft environment.

10 And you can see here that what the script is doing
11 is working with a lot of different variable names that have
12 these very programmerly abbreviations, if you will, you know,
13 we're a bit sparse with our vowels.

14 So what you see here is something that, for this to
15 work, each of these names would have had to have been typed
16 correctly, that is to say, they have to -- these names have to
17 match what's in the database.

18 And so to say that this was written without some
19 reference to the PeopleSoft tools or environment, I don't
20 think that's a hundred percent credible.

21 I mean, I don't -- I'm not saying it couldn't have
22 been typed in on a screen or on a text editor on someone's
23 computer, but I think that it's really unlikely that they
24 weren't either using a -- remotely using a PeopleSoft
25 environment to look at the database to get these names, or

1 possibly referencing, you know, some printout or some content
2 that would give them that information, maybe a copy of another
3 program that was available to them, but something to get these
4 names right.

5 There's a lot of names there, even in a short
6 script, and, it won't run if they're wrong.

7 Q Okay. I'd like to direct your attention to Exhibit 604.

8 Do you recall that Exhibit 604 is the technical
9 specification for the DMS scripts associated with the RS18F07
10 update?

11 A Yes, I see that.

12 Q And on the second page of this exhibit there's a
13 statement at the top reading, "Development was completed in
14 the OAKS environment." Do you see that?

15 A Yes. Oakland County, yes.

16 Q Okay. So do you understand OAKS to refer to Oakland
17 County, Michigan?

18 A Michigan or Maryland, I forget. It's an "M" state.

19 Q And you understand Oakland County to be another Rimini
20 customer in addition to Easter Seals.

21 A That is correct, yes.

22 Q Is this document consistent with Mr. Bengé's testimony
23 that the DMS scripts were developed on Rimini systems without
24 use of PeopleSoft utility tools?

25 A That does not appear to be true based on the wording of

1 the document here.

2 Q Does this document indicate that development occurred
3 in -- development occurred and was completed in the City of
4 Oakland environment?

5 A Yes, it says that the development was completed in the
6 O-A-K-S environment, which I understand to be the City of --
7 or the County of Oakland.

8 Q Would Rimini have used Oracle's PeopleSoft utility tools
9 to test the RS18F07 update?

10 A That would be the only way it could be tested is to use
11 the DMS tools for this component of the update.

12 MR. SMITH: Okay. I have no further questions
13 at this time. Thank you.

14 THE COURT: All right. Cross-examination?

15 MR. VANDEVELDE: May I proceed, your Honor?

16 THE COURT: Yes. Go ahead, please.

17 CROSS-EXAMINATION

18 BY MR. VANDEVELDE:

19 Q Ms. Frederiksen-Cross, does JDE World only operate on the
20 AS-1400 operating system from IBM?

21 MR. SMITH: Objection, outside the scope.

22 THE WITNESS: My recollection is --

23 THE COURT: Wait. Excuse me. We have an
24 objection.

25 Just a moment. I need to refresh on the

1 question.

2 MR. VANDEVELDE: And, your Honor, this goes to
3 her testimony about software being able to only run on other
4 software being independent.

5 THE COURT: All right. I'm sorry, I wasn't
6 listening closely to the question. Would you repeat it,
7 please.

8 MR. VANDEVELDE: Sure.

9 BY MR. VANDEVELDE:

10 Q Does JDE World -- you're familiar with that software,
11 right?

12 A Yes.

13 Q Does it only operate on the IBM operating system AS-1400?

14 MR. SMITH: And the objection is it's outside
15 the scope. We did not have any questioning regarding JDE in
16 the rebuttal presentation of Ms. Cross --
17 Ms. Frederiksen-Cross.

18 MS. VANDEVELDE: This does not go to JDE. It
19 goes to her testimony about her definition of derivative
20 works.

21 THE COURT: I'll allow the question with that
22 understanding and expect it to be limited to that subject
23 matter.

24 THE WITNESS: Counsel, I think you mean the
25 AS-400, not 1400?

1 MR. VANDEVELDE: Yes, sorry, correct.

2 THE WITNESS: And that is the current platform
3 it runs on.

4 My recollection is that originally it also ran
5 on, like, the S-36, S-35 platforms, but I'm not sure if those
6 are still available from IBM. I think they've been retired.

7 BY MR. VANDEVELDE:

8 Q Okay. So it currently runs on the AS-400 from IBM.

9 A I know that it currently runs on AS-400 for IBM, and I'm
10 not aware, as I sit here, that it had been ported to other
11 platforms, but I think it had predecessor platforms.

12 Q So it can't run independently from AS-400, correct?

13 A Again, I haven't checked super recently, but, as I sit
14 here, I think that's the one platform that it's deployed for.

15 Q So the answer is correct?

16 A As best I know, as I sit here. Again, I would want to
17 research that to answer dispositively, but, as far as I know,
18 that's true.

19 Q So it can't operate independently of that operating
20 system, correct?

21 A Now that the other operating -- or the other machines and
22 operating systems are not being sold, that's probably correct.

23 Q Okay. And it extends the functionality that didn't come
24 with that operating system, correct?

25 A It doesn't extend the operating system functionality, it

1 provides an application functionality that runs in that
2 operating system.

3 Q That's new functionality, correct?

4 A That is new functionality that is not an extension of the
5 operating system but rather a program that runs using some of
6 the facilities of the operating system.

7 Q Operating systems store data, correct, they have file
8 systems?

9 A Most do.

10 Q And JDE offers ways to store data, correct?

11 A In a database, yes.

12 Q And it does it in a way that extends the ability to store
13 data in different ways, doesn't it?

14 A A database management system is, itself, a specialized
15 type of program that allows for data to be stored, organized,
16 retrieved, and managed in a particular format.

17 Q Operating systems store, organize, and retrieve data in
18 particular format, don't they?

19 A Not typically in database formats.

20 Q In file system format, correct?

21 A Some operating systems do.

22 Q Okay. Is JDE World a derivative work of AS-400?

23 A Again, as I have expressed before, I do not believe it to
24 be so, no, sir.

25 Q Were you -- on Issue Number 5 relating to rscmpay.cbl

1 file and the psptarry file, were you provided an understanding
2 by Oracle's counsel of the difference between copying and
3 protectability?

4 A I think we have had that discussion, yes.

5 Q Was it in your report?

6 A I would want to check my report and see if I put that in
7 the legal guidance section --

8 Q What's your understanding of the difference between
9 copying and protectability?

10 A My understanding is that some things may be copied but
11 are not necessarily a violation of the rights-holder's
12 exclusive copyright for various reasons, fair use, having been
13 placed in the public domain, being *de minimus* with respect to
14 the role in the new work, but that there are factors that need
15 to be evaluated before you say that something is necessarily
16 protectible expression.

17 Q Even assuming a line of asterisks or stars was copied,
18 are you contending that that line is creative and protectible?

19 A Just a line of asterisks?

20 Q Yes.

21 A I think that is a common enough convention that, taken in
22 isolation, that line is not a protectible expression.

23 Q Even assuming white space was copied, are you contending
24 that that white space and alignment is creative and
25 protectible?

1 A Again, not in all contexts. I mean, I could see
2 situations where it might be, but I wouldn't opine that as a
3 general rule it is. I think that needs to be evaluated on a
4 case-by-case basis.

5 Q Do you think it's creative protectible expression to
6 choose the name "cursor" for the computer science term cursor?

7 A Again, I suppose it was in this specific context, but I
8 wouldn't assert that in all cases that were necessarily true.

9 Q So there's some cases where choosing cursor for the
10 term -- the computer science term cursor is not creative or
11 protectible.

12 A I would think that likely to be true, yes.

13 Q Okay. How about for using the abbreviation s-t-m-t,
14 statement, for the term statement, do you think that's
15 creative and protectible?

16 A Again, it's contextually dependent, but in and of itself,
17 absent other lines and other code, probably is a borderline
18 case. I would want to look at a specific example to say yes
19 or no here.

20 Q How about choosing the abbreviation YTD for year-to-date,
21 do you think that's creative and protectible?

22 A Again, it depends on the context and the code that's
23 around it.

24 Q So you're saying that it is or it is not?

25 A I wouldn't think those three characters in isolation are

1 necessarily protectible expression.

2 Q Okay. But in this case you contend that the use of YTD
3 in a line of rscmpay file is protectible expression?

4 A No, I think that the line that contains it is, counsel.

5 And particularly, for instance, in the YTD that
6 we've been talking about, it's not a single line in isolation.
7 There's a series of four or five lines there that are
8 identical, that perform specific function, that have unique
9 characteristics, and that are not dictated by the specific
10 programming conventions or constraints of the code in which
11 they're being used, nor any other constraint that I could
12 identify. And so --

13 Q You said "partially creative" earlier in your testimony.
14 What do you mean by "partially creative"?

15 A Well, again, you know, you just asked about, for
16 instance, the use of YTD to abbreviate year-to-date. Taken in
17 and of itself, that part of the line I would not assume to be
18 creative, just as a single word in a haiku I would not assume
19 to be creative. But, when you string enough of those words
20 together to get a fully formed haiku, you've probably crossed
21 that line.

22 Q Do you think that the term FETCH-DATA for a procedure
23 that fetches data, is creative and expressive and protectible?

24 A May be creative, not terribly creative, but may be
25 creative because there are other ways that it could be -- you

1 could say that same thing.

2 Q Is your basis --

3 A What were the other two parts of your question, though?

4 That was a three-part question.

5 Q Yeah -- no, I think it was one. Let me ask the
6 follow-up.

7 Is your basis for contending that, for example,
8 FETCH-DATA is protectible, your contention that a programmer
9 could use a different name?

10 A Certainly. I'm not saying that it's a masterpiece. I'm
11 saying that, you know, it is something specifically coded by a
12 particular programmer in a particular situation and so has at
13 least some small creative spark.

14 Q Let's move on to a different topic -- actually, hold on,
15 one follow-up question.

16 Is that your only basis to contend that that phrase,
17 FETCH-DATA, is creative and protectible is that it can be
18 written different ways?

19 A That's not my only basis in this specific situation, and
20 that is because there is a copybook, that is an Oracle-written
21 copybook, that contains that expression and quite a few others
22 that are used in the context with this rscmpay -- or, I'm
23 sorry, within the pts SQL subroutine.

24 And so it's an Oracle-provided copybook that spells
25 out these user friendly names that can be used in the context

1 of interacting with that same program.

2 So if a programmer chooses to use that copybook, as
3 we see in the cases here, they're using that name that Oracle
4 created. But that name is actually part of a set of other
5 names that define the various actions that that particular
6 subroutine is responsive to.

7 Q Let me ask my question again.

8 Is the basis for your contention that the term
9 FETCH-DATA is protectible and creative only that the
10 programmer could choose a different name if he or she wanted?

11 A No. As I've just explained, counsel, that's one factor.
12 In this particular instance, I see that as one factor amongst
13 several.

14 Q What else makes it creative and protectible?

15 A Well, again, it's a user friendly way of labeling what
16 would otherwise be a single alphabetic character.

17 You could as easily pass the F character to that
18 subroutine in a value that had whatever name you chose to, and
19 it would allow you to perform the same function using that
20 subroutine, because in COBOL the names of those elements don't
21 matter, it's their position.

22 So here somebody has said, "I'm going to make
23 this really easy to recognize what this statement is doing.
24 I'm going to do so by assigning certain names to certain
25 functions," and FETCH -- the -- select FETCH, or FETCH action,

1 rather, ACTION-FETCH -- I'll get it right eventually -- was
2 one of the names that that programmer chose to help the
3 readability of that particular program.

4 And that was an Oracle PeopleSoft programmer who had
5 originally created that statement, and so it's not --

6 Q I believe my question was a yes or no answer. I'm just
7 asking a simple question.

8 Is the only basis for your contention that the
9 phrase FETCH-DATA is protectible and expressive the fact that,
10 in your opinion, it can be written many different ways?

11 MR. SMITH: I'll object as asked and answered
12 twice.

13 MS. VANDEVELDE: I'm asking for any other basis.
14 BY MR. VANDEVELDE:

15 Q What's your basis for saying that's expressive and
16 creative and protectible?

17 A I just gave you my basis, counsel. Maybe I'm not
18 understanding your question, but I thought I just answered
19 that question.

20 Q I don't believe so.

21 Is it that it can be written in different ways?
22 What else beyond the fact that it can be written in different
23 ways?

24 A That there was a choice made to write it in a way that
25 improves the readability of the program if you're using it.

1 Q So beyond the choice --

2 A The choice to package it in that --

3 (Simultaneous indecipherable
4 conversation.)

5 THE COURT: Wait a minute. One, you're
6 interrupting the witness while she's answering the question.

7 Two, let her finish her answer, and then if
8 there's a follow-up question, I'll consider it.

9 BY MR. VANDEVELDE:

10 Q You mentioned choice. What beyond the choice of how to
11 write that name makes it expressive and protectible?

12 A Again, I'm going to try to be clear here.

13 I think the choice to -- rather than passing a bare
14 parameter, passing a parameter with a friendly name, the
15 choice of the specific name assigned to that parameter, and
16 then ultimately the way that that particular parameter was
17 packaged into a COBOL copybook, along with other parameters
18 related to the same program, is all a part of the creative
19 choice of that programmer.

20 Q I'm just talking about the name FETCH-DATA, the choice of
21 the name FETCH-DATA. Beyond the choice of that term, what
22 else, in your opinion if anything, makes it creative and
23 protectible?

24 A Well, it's not just pulling a name out of the air, it's
25 pulling the name out of the air in specific context, counsel,
in order to fulfill a specific purpose, and that is to improve

1 the readability of the program.

2 Q I'll move on.

3 Let's talk about local hosting. You understand the
4 local hosting prohibition in the injunction to mean, as
5 enjoined here, the hosting of a client's systems on Rimini's
6 systems, correct?

7 A Which paragraph of the injunction are you referring to,
8 counsel?

9 Q It's paragraph 5.

10 A Okay. I don't see the word hosting appear in paragraph
11 5. This is,

12 "...shall not reproduce, prepare derivative
13 works from, or use PeopleSoft software or
14 documentation on, with, or to any computer system
15 other than a specific licensee's own computer
16 system."

17 So this -- I don't see the word hosting in here.
18 I'm not sure what you're asking me to direct my attention to.

19 Q Have you never heard of the term local hosting in this
20 case?

21 A Oh, sure, I have.

22 Q Okay. I'm asking you about that term.

23 You understand local hosting to mean, as enjoined
24 here, the hosting of a client's systems on Rimini's systems,
25 correct?

1 A That is not entirely my understanding here. That would
2 be certainly encompassed within what is in this paragraph, but
3 this paragraph seems to be a bit broader than that.

4 Q So yes or no, you understand local hosting to mean, as
5 enjoined here, the hosting of a client's systems on Rimini's
6 systems.

7 A I would understand that to fall within what is
8 contemplated here, but I think that this is just slightly
9 broader than that.

10 MR. VANDEVELDE: Okay. If we could pull up her
11 deposition transcript, page 3 -- not deposition, her trial
12 testimony, page 365, lines 2 through 4. And, actually, if you
13 could go up a few lines and get the question.

14 BY MR. VANDEVELDE:

15 Q All right. You were asked,

16 "Okay. You've defined an environment --
17 actually, before I go there, I believe you were going
18 to say --"

19 MR. VANDEVELDE: Hold on one second. I need a
20 few more lines, John, line 1.

21 BY MR. VANDEVELDE:

22 Q All right. You were asked:

23 "Okay. You've defined an environment --
24 actually, strike that.

25 "Before I go there, I believe you were going

1 to say you understood the term local hosting as --
2 tell us, what's your definition?

3 "I understand local hosting to mean, as
4 enjoined here, the hosting of a client's system on
5 Rimini's systems, but that would be hosting it
6 locally to Rimini's systems."

7 That was your testimony, correct?

8 A That is correct.

9 Q Now, you testified this morning about allegedly finding
10 4,481 documents, correct?

11 A That is correct, yes.

12 Q And that testimony was under oath, right?

13 A That is correct. This -- I think I got the number right.
14 I may have transposed a digit, but I believe that to be the
15 correct number.

16 Q You think you only transposed a digit?

17 A No, I don't think that I transposed a digit. I'm saying
18 that if it was 4,481 or 18, I mean, I could possibly, in
19 preparing the slides, counsel, have transposed a digit. But
20 that is the number of files that I recollect.

21 Q Did you double check your work?

22 A I actually had one of my colleagues provide that number
23 to me over the phone.

24 Q So you didn't.

25 A Not as we were preparing the slide, no, because that was

1 done after I came out here to --

2 Q What was the basis for that number, 4,481?

3 A It was the work I had done in my earlier report.

4 Q And it was the spreadsheet you cited in the report,
5 correct?

6 A I believe that's -- I believe the spreadsheet was
7 provided with the report, yes.

8 MR. VANDEVELDE: Okay. Can we pull up her
9 opening report, paragraph 198, please, and if we could focus
10 on that paragraph.

11 BY MR. VANDEVELDE:

12 Q It says,

13 "At my direction, three separate searches for
14 documents with Oracle copyright statements in
15 Rimini's production were run. The following keyword
16 search was used," and you set forth the keyword
17 search. And you state, "The unfiltered search
18 identified 4,481 documents."

19 Correct?

20 A Correct.

21 Q And that was your sworn testimony today, correct?

22 A Correct.

23 Q And you cite a footnote -- well, you have a footnote
24 there, 203. Do you see that?

25 A Correct.

1 Q And that's supposed to be the basis for that statement?

2 A Better be, yeah.

3 Q Did you check the spreadsheet that you cite in that
4 footnote last night?

5 A I did not check it last night. At the time we were
6 providing -- or preparing these slides a couple days ago I
7 called back to my colleague, Wilford, and asked him to provide
8 the number to me.

9 Q And you relied on him?

10 A I did.

11 MR. VANDEVELDE: Can you zoom in on the footnote
12 203, please, John.

13 So 203 cites Exhibit 120, an Excel spreadsheet.

14 And if we could pull up OREX Exhibit 198 which
15 is that exhibit attached to your report, and if you could
16 scroll down to the very bottom, John, the last row of data.

17 BY MR. VANDEVELDE:

18 Q Ms. Frederiksen-Cross, how many rows are on this
19 spreadsheet?

20 A Could you go back to the top and let me see if it is
21 filtered in any way.

22 Q Do you see any filtering?

23 A I do not here.

24 Q How many rows are in this spreadsheet?

25 A Go back to the bottom.

1 There are 1,070 rows in this spreadsheet.

2 Q So you're off by more than 3,300 rows, aren't you?

3 A Could we go back to the snippet of my report again.

4 Q Please answer my question. You were off by more than
5 3,300 rows, correct?

6 A If this is the proper citation in that footnote, yes. If
7 this footnote citation was for the other number, I --

8 Q We'll get to the other number in a second.

9 A Okay.

10 Q So you provided sworn testimony in a report that said
11 there was 4,481, and you supported it by a spreadsheet that
12 only has 1,070 rows, correct?

13 A My recollection is that this spreadsheet was
14 de-duplicated, but I agree with you that this spreadsheet that
15 you're showing, if it's the full spreadsheet, has 1,070 rows.

16 Q You didn't say it was de-duplicated in your report, did
17 you?

18 A Pretty much everything we used in the report, with
19 exceptions where I noted otherwise, was de-duplicated.

20 Q You didn't note that, did you?

21 A I'd have to go back and look at what I said about it in
22 the report, counsel.

23 Q And you presented an incorrect number to the Court,
24 didn't you?

25 A I am confident in the work of my assistant and in his

1 provision of that number to me.

2 Q Even though he's off by more than 3,300 rows?

3 A Again, I am confident in that number, counsel.

4 MR. VANDEVELDE: Can we pull up her report
5 again, John.

6 BY MR. VANDEVELDE:

7 Q The next two -- the next two sentences of your report
8 say,

9 "Next the results were filtered to only
10 include text, .txt files, or files with file names
11 that start with 00P. This search identified 1,139
12 documents," and you cite to footnote 204.

13 Do you see that?

14 A I see that.

15 MR. VANDEVELDE: Okay. Can we look at footnote
16 204, please.

17 BY MR. VANDEVELDE:

18 Q Footnote 204 cites Exhibit 118, and it cites another
19 Excel spreadsheet.

20 A I see that.

21 MR. VANDEVELDE: And if we could pull up OREX
22 Exhibit 196, which is that Excel spreadsheet, Exhibit 118,
23 attached to your opening report.

24 BY MR. VANDEVELDE:

25 Q Now, you told the Court this morning, and it's in your

1 report, that the results of the filtered search revealed 1,139
2 documents, correct?

3 A I believe that is the correct number, yes.

4 Q And that was sworn testimony, correct?

5 A Again, that is correct.

6 Q That was on your slide this morning?

7 A It was on my slide as well, yes.

8 MR. VANDEVELDE: And so, John, if we could look
9 down at the bottom of this spreadsheet.

10 BY MR. VANDEVELDE:

11 Q Ms. Frederiksen-Cross, how many rows are on this
12 spreadsheet?

13 A There are 710 rows.

14 Q So you're off again, correct?

15 A Again, you know, I believe that this spreadsheet was
16 probably de-duplicated. I would want to double check that
17 with my colleague who assisted in its preparation.

18 But I have worked with Wilford for over ten years,
19 and he is someone who's -- the quality of his work I trust
20 completely.

21 Q But the number you presented to the Court is not
22 supported by your spreadsheet, is it?

23 A The spreadsheet -- the number I presented to the Court is
24 not shown by the rows -- the count of the rows in this
25 spreadsheet.

1 Q It's off by more than 300. That's off by more than,
2 what, almost 50 percent, correct?

3 A What was the underlying number? 1100?

4 Q Seven ten is what you claimed --

5 A Right.

6 Q -- or what is --

7 A Right.

8 Q -- actually in here.

9 A I've got 710 here.

10 Q And the previous spreadsheet we saw that allegedly
11 supported the 4,481, that does not support what you told the
12 Court today, does it?

13 A Can we go back to the spreadsheet just for a moment to
14 see if there is a count of the occurrences in these columns?

15 Q Sure. We can look at it. It's OREX Exhibit 198.

16 A Can you go up to the top, please, so I can see the row
17 headers? Okay.

18 Q There's no count column is there?

19 A I do not have a count column here.

20 Q Beyond these two spreadsheets that are -- do not support
21 what you told the Court this morning, do you have any other
22 basis sitting here today to support those numbers?

23 A Here in the courtroom with me today?

24 Q Here in the courtroom today.

25 A No, not beyond my recollection of the process that we

1 used and the counts that we derived originally, I do not.

2 MR. VANDEVELDE: If we could pull up your
3 surrebuttal report, paragraph 69, please.

4 BY MR. VANDEVELDE:

5 Q And you filtered another time based on file types,
6 correct?

7 A That is also correct.

8 Q And you -- that resulted in 934 attachments. Do you see
9 that?

10 A I see that, yes.

11 Q And you said that those are intended to be used with
12 Oracle database, correct?

13 A With respect to these specific ones that had Oracle
14 copyrights, yes.

15 Q And, by the way, 934 doesn't match either of the two
16 incorrect spreadsheets we saw or the two spreadsheets we saw
17 earlier, correct?

18 A That's correct because some of the zip files were opened
19 up, and we had expanded things before we counted the
20 individual files they contained.

21 Q And so your opinion is that 90 -- roughly, 98 percent of
22 these 934 attachments, so that's 919, are intended to be used
23 with Oracle database, correct?

24 A Correct.

25 Q And you've previously testified in this case that the

1 license that governs Oracle database does not contain a
2 facilities restriction, correct?

3 A Well, many of these were PeopleSoft Oracle licenses
4 designed to be used in that PeopleSoft context. But I agree
5 with you that I did not see a facilities restriction
6 specifically in the Oracle database.

7 Q And you filtered based on file types that are associated
8 with Oracle database, correct?

9 A Well, I would note that these file types are associated
10 with Oracle database but also with specific Oracle products,
11 for instance, PeopleSoft uses SQL and NPKB.

12 Q Ninety-eight percent of 90 files that you say is left
13 over, that's 88.2, so that leave less than two files left
14 over, correct?

15 A I'm sorry, do that -- tell me what your math is again?

16 Q You stated at the beginning of this paragraph that there
17 are 90 files left that are unaccounted for that you claim were
18 uploaded by Rimini employees.

19 A Okay.

20 Q And you say that 98 percent, roughly 98 percent, are the
21 file types intended to be used with instances of Oracle
22 database.

23 So 98 percent -- you don't have to do the math -- of
24 90, is 88.2. So that's less than two files are left over,
25 isn't that true?

1 A No, I don't --

2 MR. SMITH: Objection, vague.

3 THE WITNESS: That would be -- I mean, just
4 doing the simple math transaction, 98 percent, 2 per 900, that
5 would be -- hang on just a second.

6 MR. VANDEVELDE: I'll move on.

7 THE WITNESS: So I think -- yeah, I think your
8 math is wrong, counsel.

9 BY MR. VANDEVELDE:

10 Q Let's talk about -- you testified that the evidence and
11 testimony you heard from Mr. Craig MacKereth -- do you recall
12 that?

13 A Which -- I was asked several questions about his
14 testimony.

15 Q Yeah, you heard his testimony, correct?

16 A Yes, I was here for his testimony.

17 Q And you testified that the evidence you heard from
18 Mr. MacKereth about quarantining was new to you?

19 A With respect to showing any -- any evidence of the
20 specific quarantine method, or anything specific about it
21 other than the generic statement that Mr. Astrachan had in his
22 report, that he had been told there was quarantining.

23 Q You're aware that one of the methods Rimini uses to
24 detect files that should be quarantined is via e-mail sent to
25 security@riministreet.com, correct?

1 A I'm aware of that, yes.

2 MR. VANDEVELDE: Okay. If we could pull up
3 Oracle counsel's opening statement which is at transcript --
4 starting on line 14 -- sorry, 34, line 14, to 35, the first
5 line. If you could blow up starting at 14.

6 BY MR. VANDEVELDE:

7 Q Mr. Pocker stated,

8 "After they receive Oracle code, even if it's
9 from their clients, Rimini did not instruct those
10 clients not to send Oracle code. As I've mentioned,
11 there's no communications back to them saying, 'Oh,
12 yeah, don't do this again; don't do it ever.'

13 "There's no evidence of notification being
14 sent to what is called security@riministreet.com, and
15 in their presentation and in some of the policies
16 that are already in evidence, you'll see that
17 employees who receive third-party software or
18 copyrighted materials from clients are supposed to
19 report that incident to Rimini at
20 security@riministreet.com. There's no evidence that
21 that was done in connection with any of these
22 supposed accidental receipts of copyrighted
23 material."

24 Do you see that?

25 A I saw that until the screen switched, yes.

1 Q Do you think that's a correct statement?

2 MR. SMITH: Your Honor, I'll object as outside
3 the scope.

4 MR. VANDEVELDE: Your Honor, she has testified
5 about how things were quarantined, and what Rimini did in
6 response to alleged local hosting issues. This is directly --

7 THE COURT: Well, it's also irrelevant.

8 The Court is not concerned about a misstatement
9 that occurred by either counsel in the course of an opening
10 statement.

11 MR. VANDEVELDE: Okay. I'll move on. I don't
12 have to ask questions about that particular statement.

13 BY MR. VANDEVELDE:

14 Q Ms. Frederiksen-Cross, you reviewed e-mails relating to
15 that e-mail address security@riministreet.com, correct?

16 MR. SMITH: Also outside the scope.

17 MR. VANDEVELDE: Your Honor, this is
18 directly relevant to Oracle's contentions through
19 Ms. Frederiksen-Cross about what Rimini did in response to the
20 very files she testified about this morning.

21 THE COURT: The Court agrees. The question will
22 be allowed.

23 THE WITNESS: My recollection, as I sit here, is
24 that what I reviewed was a spreadsheet or log of such e-mails,
25 and I believe I may have seen a couple of examples of such

1 e-mails.

2 BY MR. VANDEVELDE:

3 Q Did counsel provide with you that log?

4 A Yes. I believe it was work product that they had put
5 together with respect to just --

6 Q Did you review it?

7 A I did.

8 Q We talked last week about your process for making
9 summaries of certain Salesforce cases, correct?

10 A Creating the HTML display of what was given to us in the
11 Salesforce table I assume is what you're talking about?

12 Q Remember we had the discussion about the GB column
13 labeled Important? Do you remember that discussion?

14 A Yeah, I do.

15 Q And did you review the security@riministreet logs to
16 determine whether the materials attached to those Salesforce
17 cases were reported to the compliance department?

18 A I'm trying to remember the format of that log
19 specifically, counsel. As I sit here, I don't recall if that
20 was something I reviewed or not.

21 Q So you don't --

22 A I think I searched for the specific attachment numbers,
23 but I don't think I read the entire log or anything.

24 Q So you didn't.

25 A No. My recollection is, as I sit here at least, that I

1 personally at least just searched for those attachment
2 numbers, the attachment identifiers.

3 Q Is it your testimony that none of the materials attached
4 to any of those Salesforce summaries was reported to
5 security@riministreet.com?

6 A With respect to the ones I discussed here in court, are
7 you limiting it to that or --

8 Q I'm asking -- yeah, the ones you discussed in court.

9 A I saw no such evidence until yesterday in the courtroom
10 when there was that discussion of the role of -- I'm sure I'm
11 slaughtering her name, but I believe it was Maurya -- his or
12 her name, actually -- that if you knew that that person was
13 the IT person who enforced those actions, you might be able to
14 infer that.

15 But I do not recall anything specific beyond that
16 that has been provided to me that was -- we were never even
17 given an explanation about how the alleged quarantining of
18 these files occurred. It was just a statement in
19 Mr. Astrachan's report that he had had a conversation and had
20 been told that they had been.

21 Q You chose to present five Salesforce summaries to the
22 Court, didn't you?

23 A I believe that number is correct, yes.

24 Q But you prepared six, didn't you?

25 A I think we actually prepared more than that when we were

1 converting tables to HTML, considerably more than that.

2 Q But there's six on the exhibit list, correct?

3 A I don't know what the exhibit list that was given to you
4 was, counsel.

5 Q Okay. You prepared more than five though, correct?

6 A I know that in translating the Salesforce tables to HTML
7 there is a very, very, very lengthy exhibit that was prepared
8 that had all of the Salesforce that we were able to
9 reconstruct.

10 With respect to preparing exhibits for use here in
11 court, I know counsel and I talked about a number of them as,
12 you know, what would be a good exhibit.

13 I don't specifically recall if we talked about more
14 than five, or if we prepared exhibit drafts for more than
15 five. I just -- I don't know.

16 Q Okay. Well, you prepared two relating to Guest Services,
17 do you remember?

18 A Yes.

19 MR. SMITH: Your Honor, these questions are
20 getting further and further beyond the scope. This was all
21 addressed in her direct testimony.

22 MR. VANDEVELDE: Your Honor, this is directly
23 relevant to how Rimini dealt with the very files that she is
24 accusing Rimini of locally hosting.

25 THE COURT: Response from counsel?

1 MR. SMITH: These individual Salesforce cases
2 were discussed at length during Ms. Frederiksen-Cross's direct
3 testimony. There was an opportunity for counsel to
4 cross-examine her on those cases and the cases that she
5 reviewed at that time.

6 Now we're in the rebuttal case. The only
7 content that I provided during the rebuttal case, or that
8 Ms. Frederiksen-Cross provided during the rebuttal case
9 regarding these Salesforce cases, was that four indicated that
10 there had been use by Rimini of the files to solve problems.

11 MR. VANDEVELDE: I'm looking at their slide,
12 your Honor. It has information about the Salesforce cases
13 that he presented this morning to this Court about the
14 local -- alleged local hosting issues.

15 THE COURT: I'm going to sustain the objection.

16 I will candidly tell you that I do not recall
17 testimony along that line in the rebuttal case.

18 BY MR. VANDEVELDE:

19 Q In your opinion, can a Rimini engineer install or create
20 a development environment for JDE without copying the open
21 code portion?

22 MR. SMITH: Beyond the scope. The rebuttal case
23 did not include any discussion of JDE violations.

24 THE COURT: Sustained.

25 MR. VANDEVELDE: Your Honor, I'd like to make an

1 offer of proof regarding a number -- actually, a few files,
2 and then I think I will be close to done. It relates to JDE.

3 I take your Honor's sustaining of his objection
4 that I'm not allowed to talk about JDE at all?

5 THE COURT: Well, I don't recall any JDE
6 testimony in the rebuttal case, and for that reason I am
7 granting the objection, I'm sustaining it.

8 MR. VANDEVELDE: So can I just make an offer of
9 proof about a few particular documents?

10 THE COURT: You can certainly make your offer of
11 proof.

12 MR. VANDEVELDE: Okay. I'll make an offer of
13 proof.

14 Your Honor, pursuant to Federal Rule of Evidence
15 103 -- and, your Honor, this is cross of Ms. Frederiksen-Cross
16 in Oracle's rebuttal case. We would like to call her in our
17 surrebuttal case. Can I do that, and go beyond the scope of
18 their rebuttal case?

19 THE COURT: No, you can't.

20 MR. VANDEVELDE: Okay. Then I will make an
21 offer of proof on JDE.

22 Pursuant to Federal Rule of Evidence 103, Oracle
23 has come into this court arguing, without evidence or basis,
24 in conflict with the documentary record, that the open-closed
25 distinction is somehow made-up.

1 We would like to make a very brief offer of
2 proof on a few documents, including the Gartner article that
3 was excluded earlier today during the testimony of Stephen
4 Lanchak, as well as certain e-mail communications at Rimini
5 Street, that touch on this exact issue.

6 Were we permitted to introduce the Gartner
7 article exhibit, it would show explicitly that the term open
8 code and visible code goes back many years in the industry.

9 In fact, the article would say that -- says
10 that,

11 "Third-Party application maintenance and
12 support services refer to services that maintain,
13 customize, modify, and provide technical support for
14 the application within the MEANS provision by the
15 software publisher such as tools or open code."

16 He goes on to say that, "While some ERP
17 products are delivered with tools or APIs that allow
18 the customer to modify portions of the product, for
19 example, Oracle's PeopleSoft and PeopleCode, others
20 such as JDE and SAP's ERP, have visible code that can
21 be modified."

22 That article predates the injunction by many
23 years.

24 We would also proffer e-mails, which are Bates
25 numbered RSI2_013352306 and RSI2_013223831, and these e-mails

1 similarly show that Rimini was using the terms open and closed
2 code and made that distinction as far as back as at least
3 2013.

4 Those very terms are used in the e-mails
5 regarding JDE support, including closed code and open code
6 layers exactly as Rimini has presented at the hearings.

7 These e-mails are in the specific context of
8 providing support for JDE, and we believe that these are
9 admissible for a number of reasons.

10 As I said at the outset, they are highly
11 relevant. Oracle has come into court and argued that Rimini
12 has effectively made up these terms, and these documents
13 disprove that suggestion.

14 Second, they are self-authenticating under
15 902-6, and as business records.

16 Third, they would not be introduced for the
17 truth of any matter asserted but merely to show that these
18 terms were used in the industry going back many years, and
19 used by the industry and by Rimini.

20 And, finally, the Court has discretion to let it
21 in to prevent manifest injustice under Rule 16 despite not
22 being in the prehearing order.

23 Again, it is only during the context of this
24 proceeding that Oracle has made this argument that these are
25 made up, and these are documents that Oracle has had in its

1 possession for many, many years, and in fact one of them, the
2 Gartner article, was produced by Oracle to Rimini.

3 And so we believe that they are highly relevant
4 and admissible, and so we will plan to follow up with a very
5 brief written submission on this proffer, but I at least
6 wanted to make it on the record, and I appreciate the
7 opportunity.

8 THE COURT: Okay. So noted. The Court's ruling
9 stands.

10 But if Rimini wishes to provide further
11 supplement to the Court relevant to the issue, and feels that
12 it is clearly within the scope of the rebuttal examination
13 that's been conducted of Ms. Frederiksen-Cross, I will
14 consider it.

15 BY MR. VANDEVELDE:

16 Q I think I just have one more topic,
17 Ms. Frederiksen-Cross, and it's relating to cross-use.

18 Are you -- are you aware that the Court has held
19 that Rimini is permitted to, quote, create the same update
20 file for multiple clients?

21 A I believe I am aware of that opinion, yes. I don't
22 remember the Court's exact wording in it.

23 Q It is, quote, "create the same update file."

24 A For multiple clients, yes.

25 Q Okay. And are you aware that the Court has held that

1 Rimini can memorize its work product?

2 A Yes, I recall that.

3 Q And the Court has held that Rimini can replicate the work
4 that it has done.

5 A So long as it does so without violating the injunction,
6 that is my understanding, yes.

7 Q Do you understand that the Court has ruled that Rimini
8 may, quote, use the same tests to ensure functionality of an
9 update?

10 A I'm aware of that, yes.

11 Q And that Rimini is allowed to perform, quote, less
12 testing if it so chooses?

13 A I believe the Court even contemplated that if they chose
14 to distribute something without testing, that was permitted.

15 MR. VANDEVELDE: Okay. If we could put up --
16 let's focus on issue number 3 when talking about cross-use,
17 which is the Johnson Controls issues, and if we could put up
18 DDX-202, which was a demonstrative.

19 BY MR. VANDEVELDE:

20 Q Now, using your understanding of what Oracle's counsel
21 gave you as to cross-use, how can Rimini address the W2 print
22 parameter problem for both COE, City of Eugene, and Johnson
23 Controls without violating the injunction?

24 A Well, I haven't attempted to try to figure out what
25 Rimini's work process should be, but, as a general principle,

1 if Rimini went into Johnson Controls' PeopleSoft environment,
2 performed the analysis necessary to troubleshoot there, and
3 did their work entirely using Johnson Controls' license, and
4 developed a solution in that environment using only that
5 environment and not making reference to any other customer's
6 environment, as a general principle I wouldn't -- at least as
7 I sit here -- and, you know, I'm doing this from the hip as
8 I'm sitting in the witness stand, but --

9 Q Let me make it more concrete.

10 Don Sheffield tested the print parameter solution,
11 correct, at some point?

12 A At some point he did, yes, because he states -- I believe
13 it was Don who stated in the e-mail that he said he had tested
14 it in COE, City of Eugene.

15 Q So he's in City of Eugene's environment, he tests the
16 print parameter solution, which is just inputting B9999 in a
17 certain parameter, right?

18 A I don't think you got the quite -- the right number of
19 9s, but generally, yes, putting a -- you're basically
20 supplying a definition for that parameter.

21 Q So he knows the parameter, and he now wants to perform
22 the same fix for Johnson Controls. How can he do that?

23 He knows the specific solution, exactly what to do.
24 How can he do that?

25 A Well, again, had he done that in Johnson Controls'

1 environment when Johnson Controls raised the issues, had he
2 done that work there, I think there would have been no direct
3 issue because he would not have been relying on another
4 customer's environment.

5 And I don't know from the correspondence whether he
6 looked up what Eugene already had, or if he did the old
7 classic I'll try, I'll try this, I'll try this, ah-hah, here's
8 what works in City of Eugene.

9 He just said he tested it. So he confirmed that
10 that particular definition that he had provided in the e-mail
11 was going to be adequate.

12 But had he done that work in Johnson Controls, I
13 think there would be no specific problem.

14 Q He already --

15 A And as I said earlier in my testimony, had he known that,
16 had that been in his head before -- or at the time the problem
17 arose, had he not had to rely on another client's environment,
18 then I would have not thought that putting that number in was
19 a problem because it would be something that he knew.

20 But in this case the e-mail chain clearly shows that
21 that was not something that he knew. They fussed around with
22 these other solutions and tried various things to fix the
23 problem before they ever got there.

24 Q So let's say Don Sheffield figured out the solution for
25 City of Eugene. He knows what to do with the print parameter

1 field and to type in B999 -- I'm shortening it, but let's just
2 assume it's B999.

3 Can he then, knowing that specific knowledge, based
4 on the use of City of Eugene's environment, go and do the same
5 work for Johnson Controls?

6 A In your hypothetical, counsel, we're assuming that he did
7 not go and figure that out in City of Eugene after Johnson
8 Controls raised the issue, and he couldn't get at the Johnson
9 environment.

10 In your hypothetical it was something he had solved
11 last month or last year or some other point in time, and it
12 was knowledge that was just in his possession that, for a
13 particular field, oh, if this doesn't print right, go do this.
14 Is that your hypothetical?

15 Q He knows the solution, having developed it in City of
16 Eugene, and he wants to reuse that knowledge with Johnson
17 Controls. Can he reuse that knowledge?

18 A I would think if it was just knowledge that he had in his
19 head, it was just an experience he had had as a developer
20 developing a solution, and he knows this particular solution
21 will always work in this situation, it will work in this
22 general type of situation, and so he's in Johnson Controls and
23 he says, "Oh, I've seen this problem before, I know how to fix
24 this," that he probably could.

25 Q Could he tell his coworker that the way to fix that

1 problem is to type B999 in City of Johnson's [sic] print
2 parameter field?

3 A Again, so long as he had not done the specific
4 diagnostics and made reference to another client's licensed
5 environment to diagnose, to troubleshoot that problem, or to
6 develop the fix there, I think, yes.

7 Q So he can communicate B999 to his colleague.

8 A Again, if it's something that he just has as his general
9 know-how because he solved this kind of problem before, and
10 it's not work that was done in one customer's environment that
11 is then being distributed to another customer, but rather is
12 something that is just his general know-how as a person
13 experienced with certain types of programming techniques,
14 yeah, I'm assuming that he could.

15 Q And if the fix for that problem was to write one line of
16 Rimini written code, could he write that Rimini written code,
17 that one line, in City of Johnson's -- or Johnson Controls'
18 environment?

19 MR. SMITH: I'm going to object as beyond the
20 scope because now we're getting into hypotheticals that
21 doesn't touch upon the rebuttal exam.

22 MR. VANDEVELDE: The rebut -- her examination
23 was about Rimini-created files, for example, RSI1099M and -I
24 and other ones, and so I'm asking about if Rimini writes its
25 line of code, can it reuse it with another client.

1 THE COURT: I think it's within the scope. I'll
2 allow the question.

3 THE WITNESS: Well, again, in your hypothetical
4 here -- let me just flesh out a couple details that will help
5 me answer it.

6 So you're saying that -- I'll use the two
7 parties here to make it easy -- they wrote a line of code in
8 City of Eugene, not in response to a problem raised by Johnson
9 Controls, but they just wrote a line of code because they were
10 changing the number -- the year from 2019 to 2020 on a form.

11 So they had to go in and make that one change,
12 and they remembered that that was how they had done it. So
13 they're not transferring any work product, they're not copying
14 any code, they're just -- he's remembering it and he's going
15 to go do it in another environment because he remembers that's
16 how he did it.

17 Is that -- I mean, you're saying he wrote it,
18 and then he can use it over here, and I think much depends on
19 how it gets from here to there, honestly.

20 BY MR. VANDEVELDE:

21 Q It depends on whether that one line of Rimini written is
22 retyped or not? Or remembered?

23 A Well, if it's transferred, for instance, from City
24 of Eugene to Rimini and then to Johnson Controls, it's
25 effectively being transferred from one client's environment to

1 another.

2 And I think there you have a clear instance that the
3 work done in one client's environment is being used not solely
4 for that client.

5 If, on the other hand, it's just some know-how the
6 guy has, it's just something that, again, you know, he knows
7 that you have to go into these two reports and change the year
8 from 2018 to 2019 or 2019 to 2020 because he's done it every
9 year since 2011, and he just knows that's how you do it, then
10 I don't see anything that prevents him from doing that.

11 Q So let me understand that answer.

12 You're saying that it does make a difference whether
13 he remembers that one line of code, or whether he writes down
14 that one line of Rimini written code?

15 A Again, you know, that's a little bit of an incomplete
16 hypothetical.

17 But generally speaking I think if you're talking
18 about a single line of code, the thing I would want to look at
19 is, you know, under what circumstances was the code written.

20 Was it being written over here because someone
21 somewhere else had a problem, you know, a different client had
22 a problem, well, that would fall afoul of the troubleshooting
23 prohibitions.

24 But assuming that it had just been written at one
25 point in time, and the guy just remembered that, yeah, you

1 know, we do this every year, we've been doing this for a
2 decade, we go in and we change all the 2019s to 2020s, and
3 then in 2021, we change all the 2020s to 2021, you know,
4 something like that would just be a part of a programmer's
5 know-how, I don't think that that would be excluded.

6 But as soon as you start saying he wrote it down,
7 then it's, like, okay, well, if he wrote it down, he wrote it
8 down because he didn't think he was going to remember it, he's
9 going to document something, and so it's a little bit more
10 sophisticated scenario and --

11 Q And that's cross-use in your opinion?

12 A That's where I would want to look specifically at the
13 very detailed specifics of what was being done.

14 MR. VANDEVELDE: Nothing further.

15 THE COURT: All right. Redirect exam?

16 MR. SMITH: One question.

17 REDIRECT EXAMINATION

18 BY MR. SMITH:

19 Q Ms. Frederiksen-Cross, did Professor Astrachan, in his
20 report, use the same number of Oracle copyrighted files after
21 you filtered the number down, in his report as you used in
22 your report?

23 A Yes, and it's my understanding that he confirmed that
24 number when he discussed it with Mr. -- I believe it was
25 Butler, to find out how those files had been copied.

1 MR. SMITH: No further questions, your Honor.

2 THE COURT: All right. Mr. McCracken?

3 MR. McCracken: Your Honor, if we may, we would
4 like to call Professor Astrachan to the stand in surrebuttal
5 for about ten minutes to deal with just the rscmpay file.

6 THE COURT: Okay. Let's do that.

7 And, Ms. Frederiksen-Cross, you may step down.
8 Thank you.

9 THE WITNESS: Thank you.

10 OWEN ASTRACHAN,
11 called as a surrebuttal witness on behalf of the Defendant,
12 previously sworn, testified as follows:

13 MR. McCracken: May I proceed, your Honor?

14 THE COURT: Yes. Go ahead, please.

15 MR. McCracken: Good afternoon, Professor
16 Astrachan.

17 THE WITNESS: Good afternoon.

18 DIRECT EXAMINATION

19 BY MR. McCracken:

20 Q I have called you back to the stand, Professor, to
21 discuss the comparisons of the file rspcmpay.cbl and the
22 Oracle file psptarry.cbl.

23 Were you here for Ms. Frederiksen-Cross's rebuttal
24 testimony about those two files?

25 A Yes, I was.

Q And Ms. Frederiksen-Cross focused on what she thought was

1 evidence of Rimini copying the Oracle file.

2 Do you agree with her that there is evidence that
3 shows that Rimini copied the Oracle file?

4 A No, I do not.

5 Q For purposes of a substantial similarity analysis, is
6 there a difference between the fact of copying and copying
7 protected expression?

8 A Yes. It's my understanding that as part of determining
9 whether there is substantial similarity, one has to determine
10 whether protected expression has been copied.

11 Q And with regard to that difference between the
12 fact of copying something and the copying of protected
13 expression, did you have any major disagreements with
14 Ms. Frederiksen-Cross's rebuttal testimony today?

15 A Yes, I did.

16 Q And can you elaborate on that, Professor.

17 A There were several examples that she outlined as copying
18 that I don't think qualifies the copying of protected
19 expression.

20 Q Professor, in your opinion, is white space protectible
21 expression?

22 A No, I don't think it is.

23 Q In your opinion is adjusting the white space in a file so
24 that columns line up, for example, the pic statements line up
25 or the comp statements line up, is that protectible creative

1 expression?

2 A No, it is not.

3 MR. McCracken: Mr. Jay, could we please turn to
4 DTX-501, and look at page 5, and. If you could, could you
5 blow up the top third or so of the page down to where it says
6 A00-MAIN.

7 BY MR. McCracken:

8 Q Professor Astrachan, do you recall Ms. Frederiksen-Cross
9 testifying about this section of DTX-501 which is the Rimini
10 file?

11 A Yes, I do.

12 Q And just to orient us, what do you recall she said was
13 significant about this section of the file?

14 A As I recall, Ms. Frederiksen-Cross was discussing that
15 this says AA000-MAIN SECTION, as opposed to just MAIN SECTION,
16 and that that was notable.

17 Q Is the section of this file that's called AA000-MAIN
18 SECTION, is that the main section of the file?

19 A Yes, it is the main section of the file.

20 Q In your opinion is it protectible to name the main
21 section of a file MAIN?

22 A In my opinion it is not protectible to name this MAIN
23 SECTION, as it is, and I'd like to note in reviewing hundreds
24 of PeopleSoft COBOL files, that all of them begin with
25 AA000-MAIN SECTION when they discuss the main section.

1 Q Is it protectible, in your opinion, to label the main
2 section with the letter abbreviation A000?

3 A No, it is not.

4 Q I think Ms. Frederiksen-Cross also testified that she
5 thought this particular portion was significant because
6 the flower box starting the MAIN section starts with an
7 asterisk, whereas the other flower boxes in the file start
8 with a slash. Do you recall that?

9 A Yes, I do.

10 Q Is it protectible expression, in your opinion, to start a
11 flower box with an asterisk rather than a slash?

12 A No, in my opinion, that's not protectible expression.

13 Q Why not?

14 A Because flower boxes and lines of asterisks in general I
15 would not considerable protectible expression.

16 And I also note that, as I mentioned, in the
17 hundreds of COBOL files I reviewed, those that begin -- and
18 these were PeopleSoft files -- that this is relatively
19 standard among all of them.

20 Q When you say, "this is relatively standard," what do you
21 mean?

22 A I mean the beginning of the flower box not starting with
23 a slash before the MAIN section.

24 Q So I guess just so I understand, are you saying that the
25 MAIN section often starts with an asterisk whereas other

1 sections start with a slash?

2 A Yes, that's relatively common.

3 MR. McCracken: Let's go to new exhibits. Let's
4 go to Oracle Exhibit 175 and look at page 20.

5 And while that's coming up, I will just say for
6 the record that is Ms. Frederiksen-Cross's side-by-side
7 comparison of the two files.

8 And let's zoom in on line 592 of the Oracle
9 file, if you could, Mr. Jay.

10 BY MR. McCracken:

11 Q Professor, do you recall Ms. Frederiksen-Cross testifying
12 about this piece of code that says SQL-STMT?

13 A Yes, I do.

14 Q Okay. And how do you pronounce that, Professor?

15 A I pronounce it as sequel statement.

16 Q And I believe Ms. Frederiksen-Cross testified that this
17 was significant to her because a programmer could have written
18 SQL dash the word statement all the way spelled out. Is that
19 your recollection?

20 A Yes, that is my recollection.

21 Q What is your response to that opinion?

22 A I think that, as we actually heard Ms. Frederiksen-Cross
23 say, programmers often have an aversion to vowels, and sequel
24 statement is a very common abbreviation for the full use of
25 the word statement.

1 In fact that phrase sequel statement, as written,
2 SQL-STMT, is a standard in Sequel Light which is the most
3 commonly used database in the world.

4 Q In your opinion, is it expressive or creative to write
5 SQL-STMT instead of SQL-STATEMENT?

6 A It is not creative nor is it protected expression in my
7 opinion.

8 MR. McCracken: Mr. Jay, let's go up one page to
9 page 19, please, and let's zoom in on the area that says
10 MAIN-EXIT, EXIT PROGRAM, so about two-thirds down the page.

11 BY MR. McCracken:

12 Q Professor, do you recall Ms. Frederiksen-Cross opining
13 about this particular piece of code?

14 A Yes, I do.

15 Q What was her opinion on rebuttal with regard to this
16 piece of code we're looking at, which is lines 547 and 548 of
17 the Oracle file?

18 A That somehow this was an indication of copying.

19 Q Do you recall she said that this could have been written
20 as A000-MAIN-EXIT? Did I get that right?

21 A There were -- I believe that's correct. And MAIN-EXIT,
22 as I determined from reviewing hundreds of COBOL files, is,
23 again, relatively standard across all of them. These are
24 PeopleSoft files that I'm describing here.

25 Q All right. In your opinion, Professor, is it protectible

1 and creative to use MAIN-EXIT instead of A000 MAIN-EXIT?

2 A No, it is not creative, nor is it protectible expression,
3 in my opinion.

4 MR. McCracken: Let's go to page 6, Mr. Jay, and
5 let's blow up the top few lines, lines 135 to 140 of the
6 Oracle file. Thank you.

7 BY MR. McCracken:

8 Q And, Professor, if you look at lines 136 and 137,
9 Ms. Frederiksen-Cross testified that there's a structure being
10 set up here for FETCH-YTD-END given the value of E, and
11 FETCH-YTD-START given the value of S. Do you see that?

12 A Yes.

13 Q And do you recall her testimony about that?

14 A Yes, I do.

15 Q In your opinion, Professor, is there anything about
16 giving the N variable the value E?

17 A No, nor is it creative or protected to give START the
18 value S.

19 Q And if we go down a few lines to line 139, does that line
20 relate to the cursor?

21 A Yes, and similarly to SQL-STMT being not creative nor
22 protectible, I think using SQL-CURSOR to represent cursor, is
23 neither creative nor protectible.

24 Q I think you taught us during your direct testimony what a
25 cursor is in computer science. Can you just remind us.

1 A Yes, I believe I made an analogy to a cursor blinking on
2 the screen as giving the position on the screen at where you
3 are, and that a cursor in a file or a database is the position
4 in that file or database where you are as the program is
5 executing and reading values from the file or database.

6 Q So would it be normal, in your opinion, to refer to the
7 cursor, which is a computer science term, as cursor?

8 A Yes, that seems very normal to me.

9 MR. LIVERSIDGE: Mr. Jay, could we pull up
10 Ms. Frederiksen-Cross's rebuttal slide 11. Is the -- oh,
11 you've got it. Perfect.

12 And just for the record, we're looking at
13 rebuttal slide 11, which was a portion of Oracle Exhibit 175
14 showing lines in the Oracle file 888 through 909 or so.

15 BY MR. McCRACKEN:

16 Q And, Professor, we heard some testimony from
17 Ms. Frederiksen-Cross about this line 888, the one that says
18 INITIALIZE SELECT-DATA OF S-YTD. Do you recall that?

19 A Yes.

20 Q And I believe Ms. Frederiksen-Cross testified that while
21 she agrees one would initialize before doing other steps, she
22 did not think the other words or elements on this line were
23 required. Did I hear that right?

24 A I believe you heard that correctly.

25 Q Can you just speak to that, Professor, are the words on

1 this line required?

2 A Yes, I believe I discussed that in my direct testimony
3 that the S in S-YTD is required because this is SELECT-DATA,
4 and that the INITIALIZE SELECT-DATA is required because that's
5 what we are doing when we fetch data.

6 Q And select data is a term we looked at in the API
7 document DTX-500.

8 A That's correct.

9 Q And, Professor, there's certain terms highlighted on the
10 slide. What do you understand that to indicate?

11 A My understanding is that the terms highlighted in yellow
12 might be terms that people would perhaps disagree should not
13 be constrained.

14 I indicated that they would be constrained and
15 should be filtered out doing analytic dissection, and I
16 believe Ms. Frederiksen-Cross contends that perhaps those
17 highlighted in yellow would not be constrained.

18 Q I think the term she used on rebuttal was that these were
19 partially creative. Is that what you heard?

20 A I did hear that phrase.

21 Q We talked about SQL-CURSOR. Do you think that is even
22 partially creative?

23 A I do not.

24 Q What about this line 895 that says SET FETCH-YTD-END OF
25 S-YTD TO TRUE," can you just tell us what that code does and

1 whether you think it is protectible.

2 A I do not think it's protectible. I also described that
3 in my direct testimony as when you reach the end of the
4 statement that you've just done, and this is when the return
5 code is end, that you must set a value, and setting that value
6 to true indicating the end seems relatively obvious and
7 required.

8 And the fact that we are setting a value of the
9 S-YTD, that's -- all those -- each part of this line is
10 essentially constrained by the context in which it has
11 occurred. It must be S-YTD because that's the section that
12 we're in. It must be set to true because we're indicating the
13 end.

14 So I don't think there's any creativity in that
15 line.

16 Q Right. And you're saying it indicates the end because,
17 if we look at line 893, it says if the return code is end.

18 A Yes, that's correct.

19 Q Can you explain what that means.

20 A As we discussed in my direct testimony, once you've
21 called ptpsqlrt, you wait for that call to end, and if the
22 return code is end, you take a particular series of actions
23 indicating that it's the end. And if the return code is
24 error, you also have to take a specific sequence of actions.

25 And so essentially, in my opinion, this line is

1 required by the fact that it's the end of the call that you
2 made.

3 Q All right. Thank you.

4 And then at line 899 we see the highlighting again,
5 it's just SQL-CURSOR once again, so we've already talked about
6 that, right?

7 A Yes, we have.

8 Q And then at lines 903 and line 909, Ms. Frederiksen-Cross
9 highlighted something that says PERFORM ZZ000-SQL-ERROR.

10 Do you see that?

11 A Yes, I do.

12 Q In your opinion, Professor, is it protectible and
13 creative expression to call the error module SQL-ERROR?

14 A No. As I indicated again in my direct testimony, we know
15 at this point in the program that the return code is error
16 because of what's on line 900 in psptarry, that it's an error.
17 So we must perform the error routine, and we know that's named
18 ZZ000-SQL-ERROR, so that's required.

19 Q All right. Professor, if you assumed that everything on
20 this slide that is highlighted by Ms. Frederiksen-Cross, and
21 which she claims is partially creative, if you assume that's
22 protectible expression, what's your opinion with regard to
23 whether this Rimini file is substantially similar to the
24 Oracle file?

25 A Making that assumption, which I don't agree with, but if

1 we make the assumption that it is protectible expression, we
2 have a total of one, two, three, four, five lines. This
3 psptarry file is about 1900 lines of code. I would consider
4 this *de minimus*.

5 MR. McCracken: Thank you, Professor. I have no
6 more questions.

7 THE COURT: Cross-examination -- actually, we
8 probably are due for an afternoon break. Is it short?

9 MR. ISAACSON: Yes.

10 THE COURT: All right.

11 Go ahead, please, Mr. Isaacson.

12 MR. ISAACSON: Professor, good afternoon.

13 CROSS-EXAMINATION

14 BY MR. ISAACSON:

15 Q You began your examination by saying you don't agree with
16 Ms. Frederiksen-Cross that there's evidence of copying with
17 respect to the rspcmpay file, correct?

18 A Yes, that's correct.

19 Q And is it still the case that you -- that while you are
20 able to ask Rimini, you still have not asked Rimini whether it
21 copied that file. Is that still true?

22 A That's true.

23 MR. ISAACSON: All right. I have no further
24 questions.

25 THE COURT: All right. Any further questions?

1 MR. McCracken: No, your Honor. We ask that he
2 be excused.

3 THE COURT: I'm sorry?

4 MR. McCracken: We'd ask that he be excused,
5 your Honor. No more questions.

6 THE COURT: Yes. Professor, you may be excused.
7 We will take our break at this time. We will
8 reconvene between 3:05 and 3:10, please.

9 (A recess was taken.)

10 THE COURT: Be seated, please.

11 All right. The record will show that we're
12 reconvened following the midafternoon break, and,
13 Mr. McCracken, I see you are ready to proceed so please go
14 ahead.

15 MR. ISAACSON: It's Mr. Isaacson, your Honor,
16 but --

17 THE COURT: Oh, I'm sorry.

18 MR. ISAACSON: -- he may be ready to proceed
19 also.

20 THE COURT: You know, I apologize. I've mixed
21 names several times, but I have to also say that this is the
22 first trial I've had where I've had 12 different attorneys
23 participating in the course of seven days, and I apologize for
24 any of my mistakes in addressing any you.

25 MR. ISAACSON: You have no need to apologize,

1 your Honor, we've been with you for awhile.

2 Just as a housecleaning matter, we wanted to
3 admit Exhibits 1356 through 1362 which are transcripts of
4 deposition designations that Oracle played in court, so it's
5 just the written transcripts, and Rimini has no objection to
6 that.

7 MR. McCRACKEN: We have no objection.

8 THE COURT: All right, those are submitted.

9 (Plaintiff's Exhibit 1356 through 1362
received in evidence.)

10 MR. ISAACSON: Without throwing things off
11 track, we're very grateful that we're going to go a little
12 late today and that you're allowing us to do that.

13 Before we do leave, we would appreciate your
14 guidance as to how we go about having a discussion of a trial
15 date in Rimini II.

16 THE COURT: All right.

17 MR. ISAACSON: And, other than that, I'm
18 prepared to begin.

19 THE COURT: Okay. All right.

20 MR. ISAACSON: We have an hour for closing. My
21 goal is to -- if I accomplish it, I'll be doing it in about
22 50 minutes and trying to reserve ten minutes for rebuttal.

23 THE COURT: All right. And I assume you have
24 someone there to remind you of when you reach the 50-minute
25 mark.

1 MR. ISAACSON: There's a lot of them back there.
2 We'll see if they do.

3 THE COURT: No shortage of timekeepers here.

4 MR. ISAACSON: Right.

5 THE COURT: All right. Go ahead, please,
6 Mr. Isaacson.

7 MR. ISAACSON: And, your Honor, I'm sure counsel
8 on both sides want to thank you for the serious attention
9 you've given to what are serious issues in this case over the
10 last week.

11 From the perspective of Oracle, the time and
12 attention the Court has addressed to the issue Rimini's
13 contempt has been valuable because of what has been revealed
14 in the past week.

15 Much like the jury trial in this case that
16 revealed the business practices that Rimini had previously
17 denied using, like cross-use, the hearing in this case about
18 ten contempt violations has revealed that the violations are
19 about broad and, in some cases, dramatic and even brazen
20 violations of the injunction that are built on the business
21 practices of Rimini.

22 This hearing has addressed ten violations of the
23 Court's injunction, and the Court will rule on those, but
24 those violations are the result of a business model that
25 continues to be based on violations of Oracle's copyrights.

1 Rimini does not believe in fair competition, as
2 it says. As its history shows, it believes in competition
3 based on copyright violations, and it continues to build its
4 business that way, and now we know that Rimini competes also
5 based on violations of a court order.

6 We have learned that Rimini's favorite word in
7 this case is "isolated," and its least favorite words are "we
8 are sorry."

9 Nothing was isolated here about the violations,
10 and that is why they can't stand up and apologize for it.
11 They are defending business practices that they want to
12 continue and that the Court therefore needs to address.

13 The violations were based on Rimini's ongoing
14 business model which is now about violating a court order.

15 First, we have learned that since the injunction
16 Rimini feels free to copy JDE code every day if it desires to
17 develop and test updates in order to attract customers.

18 This was the foundation of the JDE portion of
19 the jury trial that took place, and Rimini now says that trial
20 was pointless because it was only about closed -- somehow says
21 it was only about closed object code which Rimini doesn't even
22 use, and it wasn't about open source code which Rimini does
23 use.

24 Second, we have learned that development
25 testing, troubleshooting in support of clients in the easy

1 environments like the City of Eugene that are not solely -- I
2 repeat that words solely because that is the word used in the
3 license and the injunction -- that are not solely for that
4 client, that's accepted practice at Rimini.

5 Third, we have learned that informal delivery,
6 another term, of updates to clients means that testing can
7 take place in an easy environment and does not have to take
8 place before delivery to another client.

9 There are more business practices that I will
10 discuss, but these violations result from a company who, in
11 the words of Rimini's senior executive, Mr. MacKereth who was
12 here, was incredulous at the words of the Court's injunction
13 about JDE, and he continues to feel free to interpret the
14 injunction how Rimini pleases without seeking the guidance of
15 the Court.

16 The violations arise because Rimini made
17 virtually no changes in its business practices or business
18 model after the injunction. It thought it was enough to have
19 removed the general and PeopleSoft environments from the
20 Rimini systems. In opening statement it even wanted to be
21 complimented for doing that as if that was going to be
22 sufficient to comply with the injunction.

23 Oracle believes it has shown over the last week
24 that the evidence of contempt here is clear and convincing for
25 the ten violations at issue, but the contemptuous conduct of

1 Rimini is just as evident from the business practices which
2 continue to permit illegal conduct in violation of the order
3 of the Court.

4 Matt, can we look at slide 2.

5 Here is our burden of proof and what needs to be
6 proven. The Court has already set this out. Oracle has to
7 show by clear and convincing evidence that Rimini violated the
8 injunction, that's the ten instances, Rimini did not
9 substantially comply with the injunction, and Rimini's
10 violations were not based on a good faith and reasonable
11 interpretation of the injunction.

12 And those flow directly from not only the
13 quantity of violations but the fact that these flow from
14 ongoing business practices that they want to continue.

15 And after that the burden shifts to Rimini to
16 show they took reasonable steps to comply with the injunction
17 but were unable to do so, but what we have seen is they won't
18 do it.

19 Now, the evidence was quite clear that Rimini
20 made very few changes in response to the injunction. From the
21 top of the company in response to the injunction Rimini told
22 everyone they did not have to change their current practices.

23 Seth Ravin, the CEO of Rimini Street, told
24 everyone at Rimini Street that. He said, "We took immediate
25 responsibility for the injunction only because of what we had

1 only -- what we had done years earlier."

2 Rimini said, "The injunction has no impact on
3 our operations."

4 Rimini's general counsel told employees, "Pay
5 attention to your managers about how to comply with the
6 injunction," but then the managers did not do much.

7 Jim Benge, who was here, quarantined 17 files
8 because they came from the era of the practices in Rimini I.
9 He did that, he quarantined them for new customers but not for
10 updates for old customers. He stopped two tools only out of
11 what he said was an abundance of caution.

12 Ray Grigsby, in charge of the JDE team who was
13 not here, told that JDE team, "We don't need to do anything."

14 Far from showing that Rimini took all reasonable
15 steps to comply with the injunction or acted in good faith,
16 Rimini now admits it did virtually nothing because it changed
17 its practices, it said, four years before.

18 Further, in a -- it's in the injunction, Rimini
19 represented to the Court that the injunction would severely
20 impact its business practices, yet after the injunction
21 issued, Rimini said it didn't have to do anything.

22 Jim Benge showed the contempt of this company
23 for the injunction. He said Rimini is trying to do its best,
24 but he then went through that, "All we did were the things we
25 have already done."

1 Ray Grigsby, he's the one who adopted for all
2 the employees the open and closed language that was discussed
3 again today, open and closed code. That's what Rimini depends
4 upon to violate the JDE portion of the injunction.

5 And he said in that note, in that message to the
6 employee -- to the JDE team that Rimini would seek further
7 guidance from the District Court as necessary at the
8 appropriate time, and Rimini never did, and I'm going to talk
9 more about that.

10 Rimini, in its opening statement and in witness
11 testimony, has taken credit for what they say is compliance
12 after the Court found their processes illegal.

13 The Court should not be impressed at any company
14 changes that a business makes to its practices after the Court
15 has ruled that it has committed copyright infringement. The
16 Court may even remember telling Rimini that during the jury
17 trial when they made the same arguments.

18 Rimini wants credit for the parts of the
19 injunction it complied with, and it wants to use that as a
20 defense for the parts of the injunction it is violating.

21 The attitude of Rimini towards this company was
22 demonstrated in this hearing, the utter contempt for the order
23 of the Court. It emanated from the top of the company,
24 including its CEO, Seth Ravin, its president, Mr. Grady, and
25 even the general counsel.

1 They told all of the employees of Rimini that
2 the injunction was undefined, vague, and ambiguous. They
3 asked themselves often, that's the word they use, "Why is this
4 judge out to get us?"

5 They changed that. They changed that to telling
6 customers that this Court was, quote, just sold a bill of
7 goods and was misled by Oracle.

8 Rimini, including its general counsel and
9 president, even said, "Now the circuit court will correct our
10 course," which, of course, the Ninth Circuit did not do.

11 This is the company that counsel said in opening
12 statement has always been respectful of this Court. Their
13 conduct indicates otherwise, their internal words indicate
14 otherwise, and even what they say to customers shows
15 otherwise.

16 This should not be surprising. This case is
17 come -- comes with a background and a history of its own that
18 the Court is familiar with.

19 We had a trial before, and the Court summarized,
20 in issuing the injunction, some of the things that happened
21 there, and one of it is that this case from the beginning has
22 been about Rimini denying its practices, and then, after
23 trials like this, being forced to explain what is actually
24 going on.

25 The Court wrote in its order on the permanent

1 injunction, in fact, it was on Rimini Street's assertions
2 through various affidavits and deposition testimony submitted
3 in summary judgment that the Court denied portions of Oracle's
4 motion for summary judgment on its copyright infringement
5 claims and let those issues go to trial.

6 However, at trial Defendant Ravin testified for
7 the first time that Rimini Street did in fact engage in
8 cross-use and other conduct which constitutes copyright
9 infringement, but did so innocently and without knowledge that
10 Rimini Street was acting properly.

11 And the Court also will recall that it gave
12 instructions about spoliation of evidence because of a
13 PeopleSoft library that was destroyed.

14 The Court has explained that the evidence from
15 the prior proceedings show that the evidence establishes that
16 Rimini Street's business model from 2006 up until at least the
17 Court's summary judgment orders in February 2014 was built
18 entirely on infringement of Oracle's copyrighted software.

19 Nothing has changed as the evidence from
20 Mr. MacKereth showed. He said they could win JDE customers
21 through his remarkable rewriting of the injunction. Again,
22 the business model depends on copyright infringement, and, in
23 this case, a violation of the injunction.

24 The nature of Rimini's defenses here also
25 demonstrates its bad faith and lack of substantial compliance.

1 Rimini has built new business models based on the contention
2 it can relitigate the jury trial that took place, and they can
3 do that after the injunction.

4 Rimini never argued open versus closed code at
5 that trial. Now they feel free to litigate it.

6 They stipulated to providing Oracle's -- to
7 copying Oracle's original works, JDE and -- JDE at that
8 trial -- well, no, to PeopleSoft at that trial, and they
9 raised only a license defense with respect to JDE.

10 They stipulated to copying with respect to JDE.
11 Now they want to relitigate the issue of copying. Rimini
12 says, and their witnesses said over and over again, that this
13 Court says that the injunction only applies to illegal conduct
14 and, therefore, they say, Rimini has the right to litigate
15 over and over what is illegal conduct.

16 Rimini is wrong. The Court said the injunction
17 applies to conduct that has already been found illegal.
18 Rimini has no right to refight that battle, but that's what
19 they're doing when they argue open versus closed code, when
20 they say we're not copying because of analytic dissection, and
21 even their Spinnaker defenses.

22 Rimini conceded copying of original work at
23 trial. The injunction was entered. Now Rimini says the Court
24 has to analyze whether there was copying of an original work
25 every time there's a violation the plain language of the

1 injunction.

2 We know Rimini is violating the injunction
3 because Rimini's compliance arguments depend on a revised
4 injunction which they never sought. They depend on a
5 definition of open versus closed, and the injunction says only
6 source code.

7 They say analytic dissection is required. The
8 injunction says no copying. But they say every time -- if we
9 just go in and copy to our heart's content before -- and do it
10 on our systems, before you can find a violation of the
11 injunction, we've got to get all the experts here and do
12 analytic dissection day after day.

13 Rimini says it may develop and test updates for
14 client A who needs it, and then -- but also for clients B, C,
15 and D.

16 They are striking the word "solely" from the
17 injunction in paragraph 2a where it says,

18 "Rimini Street shall not reproduce, prepare
19 derivative works from, or distribute the different
20 types of software documentation unless solely in
21 connection with work for a specific customer."

22 And they are striking the words in paragraph 6,
23 "for the benefit of any other licensee."

24 It also became clear through the testimony of
25 Mr. Benge that Rimini relitigating the conduct that the Court

1 held on summary judgment in this case was illegal.

2 Rimini says it may develop Rimini code and work
3 through PeopleSoft software in the environment of client A and
4 then deliver it to clients B, C, and D, including prototypes
5 for future clients.

6 The Court addressed that in its summary judgment
7 order. It's -- and this was in the ruling on the City of
8 Flint.

9 "It's undisputed the development environments
10 associated with the City of Flint were not used
11 solely for the City of Flint's internal data
12 processing operations. Instead, the development
13 environments were used to develop and test software
14 updates for the City of Flint and other Rimini
15 customers with similar software licenses."

16 Now they say, "We can use easy environments,
17 City of Eugene environments, to develop and test software
18 updates for the City of Eugene and other Rimini customers with
19 similar software licenses," and that was outside of the scope
20 of the license as the Court found.

21 The violations in this case are in no sense
22 isolated and in no sense in good faith because they are
23 connected to the ongoing promises -- practices of Rimini.

24 Rimini copies and modifies JDE open code with
25 JDE tools to provide development and support. It uses

1 informal delivery, it uses easy access to environments not
2 solely for the benefit of that client, and it copies Oracle
3 code into technical specifications to use as pointers and
4 markers.

5 Those are things that are violations where
6 there's specific examples, but all things they say, "We are
7 permitted to do and that we do."

8 It is not even possible to estimate how many
9 individual violations there would be that would be included in
10 just Rimini's copying of JDE code which Mr. MacKereth said is
11 an ongoing and critical part of Rimini's business.

12 The substantial -- lack of substantial
13 compliance and the bad faith here was also shown because the
14 Acceptable User Policy is not complete.

15 You may remember when I asked Mr. Bengé if he
16 could reconcile the Acceptable User Policy and the injunction,
17 and he said, "Well, that would take me about 15 minutes." It
18 would take him much longer than that, because, if you compare,
19 for example, just paragraph 6 of the injunction which is the
20 paragraph that talks about support, troubleshooting,
21 development, and testing for -- from one licensee to the
22 other, and then you look at their simple instruction which is
23 the appendix to the Acceptable User Policy, this is the one
24 they said that it would use the easy to read, and do not do
25 this, do not do that, there is nothing in there to tell the

1 employees what they are supposed to do about cross-use.

2 The bad faith here was also demonstrated by the
3 fact that Rimini continues to use infringing files, and this
4 was something we learned about during this hearing.

5 They issued a notice after the injunction
6 saying, "We've quarantined 17 PeopleSoft files." Mr. Bengé
7 testified the files were quarantined because they were part of
8 the early history of Rimini when Rimini had generic
9 environments and PeopleSoft environments on its system.

10 He said that the quarantine only applied to new
11 customers and not to providing updates to customers who
12 already had the infringing files.

13 Well, that was false testimony because the
14 document that we were discussing at the time discussing the
15 quarantine file, which rsi960us -- 960us said expressly that
16 that file was need by, quote, "All new clients switching from
17 the Oracle update."

18 And even for old customers using these files for
19 updates means that Rimini was continuing its cross-use as
20 defined by paragraphs 4 and 6 of the injunction. It was
21 continuing to work on those files.

22 The initial cross-use was not halted, it
23 continued as Rimini continued to update the original files
24 that violated Oracle's copyrights, a clear example of a lack
25 of bad faith [sic].

1 Rimini's defense also heavily depended on
2 Professor Astrachan, so a few words about him.

3 As I made the point again a few minutes ago, he
4 did no independent investigation of whether Rimini violated
5 the instruction -- the injunction. His only role, as a
6 computer scientist, lots of people go to his classes, he
7 writes textbooks, but all he would do here was critique
8 Ms. Frederiksen-Cross.

9 For an academic, he had no curiosity. He said
10 his expertise was the pedagogy of computer science, and his
11 classes were popular, but there was no inquiry made in this
12 case to help the Court determine whether there were violations
13 of the injunction.

14 He was also -- it was more than that. He was
15 also hired to just believe what Rimini told him and what he
16 saw in their documentation.

17 His willingness to cross lines for his clients
18 was shown early on because I asked him -- he initially said,
19 "My understanding that a violation of the junction would be a
20 legal determination, and that's not something I would do."

21 But then he said he had a -- based on
22 Ms. Frederiksen-Cross's work that for every one of the
23 violations that there's no violation.

24 And then he said, "No, it's just -- I was just
25 thinking about cross-use," and then ultimately he agreed,

1 "Well, but I wasn't -- but the Court found that there was a
2 violation with respect to Matheson," and he's not questioning
3 that.

4 A lot of time was spent on Barbara -- with
5 Barbara Frederiksen-Cross and just by Rimini witnesses about
6 reusing knowledge.

7 Rimini spent a lot of time on this, but none of
8 the violations here relate to the use of know-how. They
9 relate to express violations of the language of the
10 injunction, and all of her testimony was tied to specific
11 violations of the injunction.

12 Now, I'm going to go out -- a little bit out of
13 numerical order here with the violations. I would like to
14 start with number 7 which is the copying of JDE source code
15 because I think that shows a lot about what is going on at
16 Rimini Street.

17 As background, Rimini's copying of JDE source
18 code has already been found illegal by the jury. Here you
19 will see the jury instructions, and you may recall these.

20 You set -- the Court set forth the elements of
21 direct infringement the second of which was,

22 "Rimini Street copied original elements from,
23 created derivative works from, or distributed the
24 original work."

25 And then, as it was explained, "The parties

1 have also agreed as stated in your juror notebook,
2 that Defendant Rimini Street copied the JD Edwards
3 software applications and related documentation as
4 well as the PeopleSoft documentation at issue in this
5 action. This means that Oracle has also proven the
6 second element of these copyrighted works."

7 The Court instructed the jury that Rimini Street
8 copied, they copied original work, and that with respect --
9 and that Rimini did not defend the case on this, and did not
10 say we're not copying protected work, we're not -- we're
11 not -- we're only working with open code, none of those
12 things, and Rimini was found liable for copying that code in
13 that original work.

14 And then you'll see the jury instruction about
15 defense at trial. The defense at trial on JDE was a license
16 defense, were these being used for archival purposes.

17 And the Court may even remember that turned out
18 to be just a way to avoid summary judgment because they
19 decided not to present any evidence that they were using it
20 for archival purposes because they weren't.

21 In any event, the jury rejected that defense,
22 and the Court entered the resulting injunction. Rimini is
23 brazenly violating that injunction because it is arguing it
24 has the right to do what was found illegal at trial and then
25 enjoined by the Court.

1 Rimini never argued this source code was
2 objectionable or to prevent them from providing JDE support.
3 We've set out here a timeline of all the briefs to this Court,
4 and the Ninth Circuit; did not happen.

5 Rimini didn't even whisper it in those briefs,
6 nor did they say that the injunction should be limited to
7 closed code which isn't even source code, it's object code.

8 So as a result, you got the language of the
9 injunction.

10 "Rimini shall not copy JD Edwards software
11 source code to carry out development and testing of
12 software updates."

13 This is also what the Court held in its summary
14 judgment opinion about the JDE license for Giant Cement and
15 said, quote,

16 "The Court agrees that Article 2 of that
17 license does not permit Rimini to access the software
18 source code to carry out development and testing of
19 software updates."

20 The result of the jury verdict on this issue was
21 a straightforward injunction based on the jury instructions
22 and the summary judgment decision.

23 The plain language of this injunction, over and
24 over we have shown, in referring to source code, is showing
25 that the term source code includes JDE code including any code

1 they want to call open.

2 I have never seen an expert before say -- and
3 this is Mr. Lanchak, that an injunction makes no sense if it's
4 interpreted to mean what it says it means.

5 He said it cannot apply to open code, it has to
6 be limited to closed code, but he agreed that source code is
7 human-readable code, and that's the open code. And he agreed
8 that closed code is not humanly readable and is object code.

9 Rimini's definition of source code is intended
10 to thwart the injunction, to relitigate the jury trial.

11 Rimini has never provided support for what is
12 closed code, that's object code, they told you that. Rimini
13 can't even access or copy closed code, they told you that.

14 At trial the only JDE code at issue was JDE code
15 that Rimini did access and copy. We weren't litigating things
16 that Rimini wasn't doing, we were litigating things that
17 Rimini was doing.

18 Rimini's definition means that paragraph 8 of
19 the injunction is meaningless because it prohibits what Rimini
20 has never done and permits the -- and would permit the conduct
21 held illegal at trial.

22 Mr. MacKereth said many at Rimini were confused
23 about the injunction but he was not. He refused to accept the
24 results of the trial or the plain language of the injunction
25 that resulted.

1 Mr. Lanchak argued that JDE licensing, and he
2 read the provisions for you, must be referring to closed code,
3 an argument not made at trial. None of the language of the
4 licenses actually accepts his limitations because the licenses
5 say source code, not object code which would be the closed
6 code.

7 Now, Rimini knew, as I said before, it needed
8 court approval to limit the injunction to open code. It wrote
9 that to the JDE team that it was adopt -- it was.

10 "...adopting this for the time being
11 consistent with our current understanding, and we
12 will continue to access open JDE code consistent with
13 license terms and seek further guidance from the
14 District Court as necessary at the appropriate time."

15 Rimini's decision to contemptuously violate this
16 injunction is made clear in that exhibit, Exhibit 2. This is
17 in November after a stay was lifted. This is different from
18 what Rimini did when the injunction was first issued, then
19 they made the decision to look at things over the shoulder.
20 Seth Ravin testified to that.

21 You never heard who made the decision not to
22 seek further guidance from this Court. No one accepted that
23 responsibility, but we know that falls on the shoulders of CEO
24 Seth Ravin who continues to build this company on business
25 models that violate the law.

1 The decision to write this to your employees and
2 to not follow through for a company when you have just been
3 found to violate Oracle's copyrights, to have an injunction
4 entered in to you, the decision to not transparently come to
5 the Court and make the arguments that they want to make is
6 absolutely remarkable. It shows the intent to disobey this
7 injunction. It's one of the strongest pieces of evidence of a
8 lack of good faith and failure of substantial compliance.

9 The plain language of the injunction, as I said,
10 is evident in the definitions of the US Copyright Office,
11 Webster's Dictionary, Rimini's Acceptable User Policy,
12 Rimini's own expert, Professor Astrachan, and also the JDE
13 dictionary.

14 You heard all this stuff about, well,
15 industry -- there's industry use in this proffer about --
16 there's industry use of the terms of open and closed. That's
17 lovely that there's this industry out there that use those
18 words. Those are not the words of the injunction, and they
19 don't mean source code. Source code means human-readable
20 code.

21 And you heard about Rimini's over-the-shoulder
22 processes, and you heard over and over again they don't like
23 them now, but when the injunction was first adopted Seth Ravin
24 said, "We implemented it."

25 Mr. MacKereth said, "Well, we thought about it,

1 we never did it."

2 The CEO said they implemented it, and then you
3 heard the evidence that they told customers it was going to
4 work out fine.

5 And there was even -- and then, Mr. Grady, the
6 president of Rimini, said, "It's okay, the stories that the
7 injunction mattered were sensationalistic, and most of our JDE
8 work doesn't even touch source code."

9 Remarkably, Mr. MacKereth said the president of
10 Rimini, higher up, did you not know what he was talking about
11 and then made his own sensationalistic statements that
12 Mr. Grady was criticizing.

13 The injunction has prohibited the copying of
14 source code since November 2018, and now Mr. MacKereth
15 predicts disaster if Rimini has to comply.

16 One of the arguments that was made was that
17 Oracle's definition of source code does not render paragraph
18 10 of the injunction superfluous.

19 If you look at them, only paragraph 8 prevents
20 copying source code. Only paragraph 10 discusses cross-use,
21 discusses derivative works, or prohibits copying and use of
22 software documentation.

23 Then there was this whole litany of evidence, as
24 I just said, about industry practice in Spinnaker. There's no
25 evidence in the record of what JD Edwards' customers were

1 issued in Oracle's review of Spinnaker's processes. You heard
2 that, you don't know what was happening back there, and it
3 happened in 2011, and the injunction does not apply to
4 Spinnaker, it applies to Rimini.

5 Mr. Lanchak argued that JDE customers have tools
6 that modify and copy codes, but Rimini is not a client,
7 they're not licensed, and the Court has already held in that
8 summary judgment ruling I said, looking at the Giant Cement
9 license, which is in this record as OREX_67, that the license
10 makes a distinction between what the client can do and what
11 the support -- the third-party provider can do, and that's not
12 access or copy code.

13 Mr. Lanchak has said, "Well, everybody I know in
14 my history has been working with this open code."

15 He wasn't knowledgeable of any of the licenses
16 and what was permitted, and, of course, clients can do those
17 things, nor, in all of his history and all this time did he
18 say he had ever worked with anyone who had been adjudicated as
19 a copyright violator.

20 All right. Now, let me talk about violation 1.

21 It's -- the Court has already held that there's
22 a violation here, and we summarize the range of evidence here
23 in a chart on page -- that we've laid out here.

24 There's Oracle file and documentations on
25 Rimini's systems, there's three of them for violations, three

1 more for lack of substantial compliance.

2 We know which clients sent it to them. We know
3 that -- they say for each of them in these Salesforce things
4 you get the Oracle copyright -- oh, all of them had the Oracle
5 copyright warnings.

6 Some of them were internally distributed by
7 Rimini, not just in the Salesforce record. Some of them were
8 used by Rimini. None of them were e-mailed to Rimini
9 security.

10 There was a contention that during the discovery
11 period some gentleman who was not identified by what he did,
12 did some quarantine in August, I believe, 2019, all right, but
13 nothing contemporaneously.

14 There was no documentation of quarantine at the
15 time, and all of these were admitted either directly or
16 implicitly by Mr. Benge as violations of the Acceptable User
17 Policy, and there was only one instance of discipline.

18 In addition, Barbara Frederiksen-Cross
19 identified 934 PeopleSoft documents with copyright warnings,
20 and then Rimini's expert, Professor Astrachan, looked at that
21 and agreed.

22 There was some fuss today about what the
23 files -- the files from which they were screened on to get to
24 the 934, but the two experts agree on the 934, and then
25 something remarkable happened.

1 Professor Astrachan discussed the 934 with the
2 assistant general counsel of Rimini, James Butler, who
3 reported that Rimini had already flagged these documents, they
4 already knew about this, all right? As potentially containing
5 third-party intellectual property material.

6 As was typical of Professor Astrachan, he asked
7 no questions about this, and never -- Rimini never explained
8 what it did with almost a thousand potential violations of the
9 Acceptable Use Policy and the injunction that they knew about
10 before our expert notified them about it.

11 Mr. Bengé -- he's the only -- he and his
12 colleague Ms. MacEachern were the only ones we know who have
13 been disciplined, and that took years.

14 Rimini -- and then he testified about -- he was
15 trying to testify they were acting in good faith, but it only
16 showed what they're not doing.

17 We are, I think, still learning, and this is a
18 situation where we've had a few occasional cases where things
19 like this have happened, and we've got to make this more
20 clear, right? Those boilerplate warnings aren't enough.
21 We're glad to have them.

22 But what you didn't see in the Salesforce
23 records was when an e-mail -- when a file was sent that the
24 reply was, "Please don't send this to us, you're not supposed
25 to send this to us, this is not our policy." In fact, you saw

1 in some circumstances they were circulated and used.

2 We live in a world of boilerplate, and we know
3 it doesn't work by itself.

4 And then there was a discussion of quarantine.

5 Jim Bengé said, "If it was reported, it would be
6 quarantined." But we don't know what violations were
7 reported.

8 The files Professor Astrachan saw he said were
9 not quarantined. He saw no documentation of any quarantine.

10 Craig MacKereth got on the stand and pointed to
11 two Salesforce documents he said he thinks somebody went in
12 and created a quarantine. This is in August of 2019 while
13 discovery was going on, right after they agreed to produce
14 Salesforce records, but that's only two documents.

15 Let's go to violations 2 through 4.

16 Two through 4 -- I begin with 4 because it works
17 that way chronologically, Spherion-Smead, then Matheson
18 Trucking, and Johnson Controls.

19 And there's a chart on slide 41 which summarizes
20 the cross-use of the City of Eugene. The files are listed
21 there, and -- for 4, which is Spherion-Smead, 2, Matheson, 3,
22 Johnson Controls.

23 The client environment that was used for testing
24 wasn't needed by that client. They dispute this, but we have
25 shown the evidence that says it was not needed by that client.

1 Was it solely for the City of Eugene? No one
2 attempted to say it was solely for the City of Eugene. They
3 said the opposite. They said, "We were using it for others."

4 We said, of course, who is the client requesting
5 the update, there you see Spherion-Smead, Matheson, and
6 Johnson Controls.

7 And then was there testing in that client
8 environment. We know for Spherion-Smead there wasn't because
9 they never got access. For the others there was no
10 documentation.

11 The City -- moving to 43 here, the City of
12 Eugene's software license prohibits the use of software for
13 purposes other than solely the City of Eugene's internal
14 dating processing operations.

15 That's the language on which the jury verdict
16 and the jury instructions and the injunction was based.

17 Now, Mr. Astrachan in many cases was arguing
18 against these prior rulings, and one of the things he said was
19 if there -- is it -- I asked him the question is it cross-use
20 if there's no reproduction or derivative work of Oracle's
21 software.

22 And he said, no, it's not, "We want to see both
23 of these," which is directly contrary to the Court's order
24 in -- summary judgment order in Rimini II which talks about
25 even if the individual updates was not a derivative work.

1 However, we've also followed the Court's
2 guidance as to what was a derivative work following the
3 *Microstar* case. This Court has applied an analysis that
4 Professor Astrachan has ignored and even disagreed with some
5 of its elements.

6 And we have followed those here, and this was
7 where you get the testimony about using these things in the
8 PeopleSoft environment and being able to use them in a
9 PeopleSoft environment.

10 The only dispute of fact here is the PeopleSoft
11 tools fact, and you heard more testimony about that today.
12 But all the other facts are present here that the Court relied
13 on its summary judgment decision, and there is nothing in the
14 facts of this case to distinguish it from *Microstar*.

15 So the testimony, and Ms. Frederiksen-Cross, set
16 forth, following what the Court said is the proper analysis,
17 why that analysis applies here. This is an example of her
18 testimony applying the relevant facts.

19 So that brings us to the Spherion and Smead
20 violation which is Exhibit -- there you go.

21 Now, we know the City of Eugene did not need the
22 form in 940 Schedule A update because it doesn't operate in
23 the Virgin Islands. Everyone agreed to that.

24 We learned that the IRS said that in
25 November 2018. Rimini was not playing it straight when it

1 told the Court that US clients would generally need this
2 update and that that's what its engineers were thinking in
3 January 2019.

4 It has a Business Analysis team that they told
5 you about that's in charge of reviewing these announcements
6 and making decisions about who would be in scope for an
7 update.

8 So when did the test in the City of Eugene take
9 place? January 24th. This document shows that Don Sheffield,
10 who, like his CEO and president, did not appear as a witness,
11 tested the update in January 24th when only Spherion was in
12 scope.

13 Why did he do that? Did he do it because the
14 City of Eugene did it -- needed it? No, it was because
15 Mr. Sheffield couldn't get into the Spherion and Smead system,
16 he didn't have access, and so he accessed City of Eugene when
17 only Spherion was in scope on January 24th.

18 The immediate prior entry before that by the
19 head of the Business Analysis department on January 10th,
20 Laurie Gardner, said only include Spherion within scope.

21 By January 10th Business Analysis had figured
22 out what the IRS had notified in November, but what happened
23 was they told you something different.

24 Mr. Bengé -- there's a later e-mail where he
25 says on January 25th I tested, referring to his test that he

1 said he did on January 24th. So they tried to move the test
2 to January 25th, so did Professor Astrachan in that
3 timeline -- in that slide I spent with him.

4 And the Rimini -- and this is an example of how
5 the Rimini witnesses in this case were advocates. They
6 overreached, they misstated documents.

7 Both Mr. Bengé and Professor Astrachan told the
8 Court what happened based on these documents but -- instead of
9 investigating from their actual engineers what really
10 happened, and they also testified about tests that were not
11 documented.

12 So what happened? Mr. Bengé and Rimini Street
13 used informal delivery to violate the injunction.

14 What was remarkable and important about informal
15 delivery was it was revealed not as an isolated incident but a
16 business practice of Rimini on an ongoing basis.

17 He said, "I don't think it's a requirement
18 necessarily that we test something in a client's QA
19 environment prior to us delivering it."

20 But what they told you over and over again is,
21 "We're going to test it someday when it's a batch or," you
22 know, whatever. "But when a client needs it, we'll give it to
23 them, we'll give it to them as an informal delivery, and we'll
24 test it in an easy environment like City of Eugene first."

25 So that -- what happened then with Matheson

1 Trucking is they used the same update, and then they used that
2 for a bug fix.

3 Mr. Bengé tried to say, "Well, there was
4 separate testing in the Matheson environment," but his
5 testimony was entirely conflicting, both with the documents
6 that said, "I'm not sure if it's been tested for Matheson."

7 And ultimately he said, "I don't believe it's
8 been tested in the Dev environment." That's what he
9 concluded.

10 Then after that you get -- and it's all in the
11 same time period -- Johnson Controls.

12 And up in the upper left-hand corner here you
13 heard some more about Johnson Controls today. That's a
14 screenshot from the City of Eugene environment sent to solve a
15 problem for Johnson Controls.

16 We learned that Rimini, in a phone conversation
17 between two engineers, did a break fix in the City of Eugene
18 environment for Johnson Controls.

19 Rimini says it was using know-how here, but that
20 never held up. What happened was Johnson Controls identified
21 a bug, Rimini Street went to the City of Eugene environment
22 which had not reported any bug issue, they did troubleshooting
23 of the bug, and then Rimini instructed Johnson Controls what
24 to do.

25 Rimini Street -- City of Eugene did not need

1 that W2 bug fix update. The document said, "We will be
2 handling this on a case-by-case basis. It will depend on the
3 data they report," and City of Eugene never reported that
4 data.

5 In fact, Mr. Bengé tried to say, "Well, we
6 thought they did, but then, after we took some time, we
7 figured it out."

8 And he said that would take days but certainly
9 more than an hour, and it turned out that notice came out less
10 than an hour later. Once again, the Business Development
11 department already knew that -- knew about this.

12 So I'm going to move to violation 5.

13 Now, this is a file that was just talked about,
14 the rspcmpay file distributed at least 14 times to seven
15 clients, and Professor Astrachan said it doesn't matter
16 because of analytic dissection.

17 And, as I said, what was shown in
18 cross-examination is analytic dissection is absolutely
19 irrelevant for copying, and it's also been explained that --
20 how he started with A criteria, moved to 5 for the hearing.

21 And he's actually, with all his teaching and
22 everything, never published in this area, but most
23 fundamentally, 63, there is a Catch-22 going on here that
24 he wants to use to nullify the jury verdict, nullify the
25 injunction and even copyright law, because what he said was,

1 "I expect programmers to follow conventions, and the lines
2 that are constrained by that convention I would filter out."

3 He expects only the conventional, and you don't
4 count the conventional, and after that nothing is
5 copyrightable and none of which is consistent with the
6 language of the injunction.

7 If you accept that, they are free to copy to
8 their heart's content, and contrary to that Professor
9 Astrachan admits programming is absolutely a creative process.

10 A few words about violation number 6, and -- if
11 we can go to 69, the derivative work discussion that's been
12 going on.

13 Professor Astrachan basically ridiculed the
14 criteria used by the Ninth Circuit in *Microsoft* -- in
15 *Microstar* saying that every game working on Microsoft
16 operating system would be a derivative work. That's wrong, it
17 would only affect the application software. It doesn't create
18 a derivative work of the operating system.

19 By contrast, as he admits, there is a derivative
20 work created by updates that alters the PeopleSoft
21 environment. That's the next slide.

22 And for there he admits there's a derivative
23 work, but he says it's not compliant with the -- it is
24 compliant with the injunction which cannot be reconciled with
25 paragraph 2 of the injunction which says you have to obey the

1 license, and the Easter Seals license does not permit -- does
2 not permit that, does not permit the client to create
3 derivative works.

4 Which brings to us to slide 74.

5 What happened here violated the junction. The
6 chart you saw a little earlier on cross which says -- on
7 rebuttal, that's not what happened. What happened here is
8 that the update contained two SQR files and two Data Mover
9 scripts.

10 Rimini e-mailed the update to at least Easter
11 Seals, XCorp, Pikeville Medical Services, and others. These
12 were derivative works, the SQR files.

13 So developing them in the Easter Seals
14 environment violated Easter Seals' license, and that's
15 paragraph 2 of the junction, storing and modifying them on
16 Rimini systems violated paragraph 5 of the injunction, and
17 reproducing them by e-mailing them to Rimini clients violated
18 paragraph 5.

19 And the Data Mover scripts were developed and
20 tested using PeopleSoft tools in the Oakland County
21 environment and sent to other clients like Easter Seals.

22 The Court asked some questions about what was
23 delivered and when, and we've answered that in the last
24 section of that.

25 So I will say just one other word about the --

1 the tech spec documents which was violation 9, and what I will
2 say there that what we learn there -- and this is where there
3 were markers and pointers using Oracle code, what we learn is
4 they copy Oracle code, they use it in order to be able to mark
5 things to say put things there, and what we learned was it's
6 not just this document. This is a practice again at Rimini
7 Street.

8 So -- and, lastly I'll say on paragraph number
9 10, that is also a -- an example of a business practice at
10 Rimini Street because they are arguing that we can use
11 derivative works created for one client and then also for
12 future clients.

13 They are not going to do things solely for that
14 client, they're going to do it for future clients which is
15 what happened with Johnson Controls and with Rockefeller --
16 Rockefeller environment in that case.

17 With that, I've got a few minutes left, somebody
18 will tell me what that is, and I thank you for your attention,
19 and I look forward to addressing you for those few more
20 minutes later.

21 THE COURT: All right, thank you.

22 MR. VANDEVELDE: Your Honor, may I proceed?

23 THE COURT: You may, Mr. Vandeveld, go ahead.

24 MR. VANDEVELDE: And thank you, your Honor. I
25 just want to echo Mr. Isaacson's comments as well. Rimini

1 appreciates the time and attention you've devoted to this
2 matter. It is very important to us, and we very much
3 appreciate your time.

4 This Court issued its OSC and set this hearing
5 because it had questions about these ten issues and it wanted
6 to hear evidence, the actual facts about these ten issues, so
7 that's what we did. We brought five witnesses.

8 Your Honor had questions about PeopleSoft, so we
9 brought the head of PeopleSoft, Mr. Jim Bengel.

10 Your Honor had questions about testing and
11 quality assurance, and so we brought the head of QA, Brenda
12 Davenport.

13 And your Honor had questions about JDE, and so
14 we brought the head of Global Support Delivery, Craig
15 MacKereth, and we brought technical experts Professor Owen
16 Astrachan and Stephen Lanchak, the only expert in this case
17 who is an expert in JDE.

18 And so while Oracle instead spent the first -- I
19 believe I counted 25 minutes of its opening -- or, sorry, its
20 closing statement relitigating the past and talking about Seth
21 Ravin, we want to focus on the evidence.

22 We intended to address your Honor's questions,
23 and I submit that we have, about what was developed, where and
24 by who, that it was developed for each client in each client's
25 separate siloed systems, about Rimini's work product showing

1 that it is Rimini's creative expression, those are the files
2 we have been talking about the last week and a half, RSI
3 quarter tax, rsi940, RSI cmpay, Dev instruction, tech specs,
4 those are Rimini's work product.

5 And what you didn't hear were opinions from
6 Oracle's expert saying that they were substantially similar to
7 Oracle code with the one exception of the rscmpay file.

8 And also presented evidence about how Rimini's
9 JDE processes work and how Rimini is simply doing what every
10 JDE consultant, system integrator, third-party support
11 provider, has done for decades, which is to modify the very
12 open code that has to be modified, that Oracle provides tools
13 to modify.

14 And so we'll end where we began. I'm going to
15 go through the ten issues in a somewhat methodical manner,
16 we're going to march right through them, and before I do that,
17 though, I just want to briefly touch on the burden because I
18 think it's important.

19 Oracle has a heavy burden in this case. It has
20 acknowledged the elements that it needs to prove. They're up
21 here on this slide, this is from Oracle's brief.

22 It has to prove that Rimini violated the Court's
23 injunction, that it was beyond substantial compliance, that
24 Rimini's violations were not based on a good faith and
25 reasonable interpretation of the injunction, and all of these

1 have to be proven by clear and convincing evidence, and that's
2 a heavy burden.

3 The Supreme Court has said that the fact finder
4 has to have an abiding conviction of the truth its factual
5 contentions are highly probable, that there's no substantial
6 doubt, the unhesitating assent of every reasonable mind, and
7 at the bottom one there, the absence of evidence, the absence
8 evidence does not support a conclusion that a plaintiff has
9 met their burden by clear and convincing evidence.

10 Now, why is that last point so important in this
11 case? Because this is what this slide, 806, demonstrates
12 Oracle's strategy here. These are examples of Oracle's
13 improper attempt to burden shift, to shift the burden onto
14 Rimini.

15 The slide on the -- the portion on the left says
16 Rimini has no evidence that they complied with the junction.
17 That's from Oracle's opening. That's burden shifting.

18 Throughout the trial there's numerous instances
19 where Oracle was saying there's no evidence of discipline.
20 That was false, by the way. There's no evidence that it was
21 quarantined. That was false by the way. But these are
22 examples of burden shifting.

23 They said, "I saw no evidence that Rimini was
24 complying with this policy." Again, that was false, but it's
25 also burden shifting.

1 That there was no evidence that it was reported
2 or that it was tested or that it was developed. All of those
3 are burden-shifting tactics to put the onus on Rimini to prove
4 it is not in contempt when the only burden here is on Oracle.

5 In fact, you heard Mr. Isaacson talk about who
6 Rimini could have called and didn't call, and who they should
7 have put on. Again, those are forms of burden shifting, and
8 it is not proper in this proceeding where the only burden is
9 on Oracle.

10 Now, I want to get through the -- start the ten
11 issues. Here they are again, and I'll talk about the first
12 set of them. Those are the two PeopleSoft local hosting
13 issues.

14 Now, as your Honor has ruled, the local hosting
15 conduct at issue in Rimini I was the hosting of entire
16 environments, and Ms. Frederiksen-Cross, as you see in this
17 second box here, she interpreted that prohibition as enjoining
18 hosting of a client's systems.

19 That's Oracle's own expert interpreting
20 consistently with what your Honor had ruled, that it was about
21 environments, and that what is not at issue here because there
22 are no environments on Rimini's systems.

23 Your Honor many years ago ordered that Rimini
24 couldn't locally host environments, and so Rimini got all of
25 those environments off its systems and moved them back to its

1 clients, and, ever since, has been having a remote model where
2 each client's environment is on their own separate and siloed
3 systems, and it is undisputed that Rimini does not host those
4 any more.

5 So what was at issue in this hearing?

6 Well, the evidence, the actual evidence was
7 about four support cases involving eight files and three
8 e-mails involving 11 files, and that's in the context, as you
9 heard evidence of, and it wasn't disputed, 10 to 15,000
10 updates during the relevant time period.

11 Ms. Frederiksen-Cross admitted that each of
12 these files you see here was sent to Rimini by a client or
13 even an Oracle partner in one case.

14 And what they came to this hearing saying turned
15 out not to be true. When we started this hearing Oracle's
16 message was there was no warnings to clients. Oracle's
17 counsel said they haven't identified a single reminder. That
18 wasn't true.

19 Ms. Frederiksen-Cross says, "I've never seen
20 such evidence." We all now remember the GB column labeled
21 Important that showed warning after warning after warning.

22 They told your Honor that there was no
23 quarantining of files. That was actually not true.
24 Mr. MacKereth talked about that.

25 They said that there was no reports to

1 compliance. That was not true. That there was no outreach to
2 clients that sent files. Again, that was not true.

3 What the actual evidence showed in this case was
4 that there were warnings to clients. There is automatic
5 scanning and quarantining. There is routine training for
6 employees and education of its own clients, and that employees
7 have been disciplined, and there is outreach to clients who
8 have sent files.

9 And so Oracle pivoted, and so you heard that
10 this morning. They pivoted to a whole new set of files that
11 was not part of your Honor's OSC. They put before your Honor
12 a number, 4,481, which had no basis, was not supported by any
13 evidence in Ms. Frederiksen-Cross's report.

14 They put forth another number, 1,070, that was
15 also not supported by any evidence we've seen, and she,
16 herself, admitted that those spreadsheets did not support her
17 analysis.

18 And so where they landed was on this number 934.

19 But what's important here is that they offered
20 no opinions on the content of those files, and the testimony
21 is right below.

22 I asked Ms. Frederiksen-Cross,

23 "And of those 934 documents, you didn't offer
24 opinions on the contents of those files, correct?"

25 And she said only with respect to the few that

1 she had presented the day before, not to the balance of those
2 files.

3 Nor did they offer an opinion on how they were
4 used. And, in fact, she, herself, wrote that the files are
5 intended to be used with Oracle database. I asked her that,
6 and she said that's correct.

7 And, importantly, there's no facilities
8 restriction as to Oracle's database. There's no local hosting
9 prohibition, there's no facilities restriction.

10 The Ninth Circuit has said there can only be a
11 local hosting prohibition if there is a facilities restriction
12 in the license, and Oracle database is governed by the OLSA
13 and not any other license with a facilities restriction.

14 I'll turn now to Issue 5. There's obviously
15 been a lot of testimony about this. This slide is from
16 Professor Astrachan. He analyzed these files, he did analytic
17 dissection in the first instance before Ms. Frederiksen-Cross
18 had done any of that. The first time she had done analytic
19 dissection was in this hearing this week.

20 Professor Astrachan analyzed the files and
21 pointed out that although they load data from the same
22 database, they act differently, they have different purposes,
23 different functions. They load different types of data.

24 Rimini's loads less data but more granular data.
25 It breaks it into more detail. It stores it in different

1 Rimini-created data structures.

2 And then we saw the analytic dissection based on
3 these code comparisons, but what's important to remember,
4 these side-by-side comparisons that Ms. Frederiksen-Cross
5 prepared, these are the very same side-by-side comparisons
6 generated by a tool she used in another case that were deemed
7 unreliable in a copyright case.

8 These exact same tools generating the exact same
9 type of side-by-side comparisons were deemed unreliable, and
10 her opinions were excluded.

11 Now, Ms. Frederiksen-Cross had never before
12 performed analytic dissection on this file before this week.
13 She did not consider any constraints that are set forth by the
14 Ninth Circuit or by *Nimmer on Copyright* like APIs, like
15 industry terms, like required terms under the programming
16 language itself.

17 She attempted to say that naming a procedure
18 error processing because the procedure actually processes
19 errors was somehow protectible and creative.

20 She said you could use the phrase go get 'em
21 instead of FETCH-DATA. Her opinion seems to be that if you
22 can name a variable anything you want, that that makes it
23 unconstrained, in her words, and therefore inherently
24 protectible. That's not the law.

25 She focused on stars or asterisks and spaces and

1 slashes. Those were the basis for her opinions, and she's
2 conflating copying with protectability. That's the key
3 question here, are these things protectible, and she didn't
4 filter them out.

5 Professor Astrachan, on the other hand, he
6 methodically went through this file, he analyzed each line, he
7 talked about those terms, and he filtered out, this is not
8 protectible expression.

9 It's not copied. He didn't see indications of
10 copying either, but even if it were, that doesn't mean it was
11 protectible. That's the key.

12 And it's not just that she hadn't done the
13 analysis before, which she didn't, or that she did it wrong,
14 which she did, it's that the analysis that she did do was
15 misleading, and she even walked some of it back today.

16 The side-by-side comparisons, as I mentioned,
17 those were found to generate false positives. That's in the
18 *Drop Zone* case where the Court excluded her analysis.

19 She claimed that 30 percent of the lines matched
20 through what she called normalized line matching, but then
21 admitted that that was before any filtering had been applied
22 to take into account any constraints, and that only some of
23 them were interesting.

24 And she acknowledged that when do you normalized
25 line matching, which she essentially backed off of in terms it

1 being -- relying on it in this proceeding, she acknowledged
2 that it destroys all structure, sequence, and organization.

3 You can't take a normalized line match in those
4 two sets of lines and compare them and reach a reliable result
5 because they completely eliminate all structure, sequence, and
6 organization.

7 And then in this third bullet we see -- she made
8 a big deal, she spent a lot of time on the so-called orphan
9 asterisks and the oddness with the flower box, and then this
10 morning, recognizing the weakness of that position, she backed
11 off of it. She retracted that opinion.

12 And we actually saw this, the reason she backed
13 off that opinion is because she based it using different types
14 of fonts in the files to create, to manufacture a fake
15 difference.

16 Where that star under the red arrow in this
17 slide somehow juts out way beyond where it should have been,
18 that was a manufactured difference, and it was the basis of
19 her testimony until this morning when she retracted that
20 opinion.

21 Now, I want to turn to the cross-use issues.
22 There's five of them, issues 2, 3, 4, 6 and 10, and there are
23 a couple of issues that underlie all of the cross-use issues
24 that I want to briefly hit here.

25 First, this is the law, this is the Ninth

1 Circuit law, the definition of derivative work.

2 It has to -- it must substantially incorporate
3 protected material from the pre-existing work in some form,
4 literal or nonliteral, but it has to substantially incorporate
5 protected material. That's the definition.

6 And what's critical here is there has been a lot
7 of confusion that Rimini -- we have been trying to unpack
8 because when Ms. Frederiksen-Cross talks about files and code,
9 she's not making clear where that code is.

10 So, yes, when Rimini uses its own expression,
11 these blue files, that she said she had no opinion on whether
12 they were substantially similar to any Oracle code, it's
13 undisputed that those are Rimini-written expression.

14 When the Rimini expression is in the client
15 environment, and, yes, it modifies that client environment,
16 yes, that is a derivative work, but it's compliant. Why?
17 Because the client has a license.

18 There's no dispute that every single client with
19 respect to every environment and with respect to every file
20 has a license. So when that Rimini expression is in the
21 client's environment, that's licensed, it's not a violation of
22 the injunction.

23 But that doesn't somehow transform the Rimini
24 expression by itself into a derivative work unless it
25 substantially incorporates Oracle expression which it's

1 undisputed that it doesn't.

2 Now, Oracle, they put forth a series of
3 definitions all of which are wrong. Every single definition
4 on this slide is wrong.

5 They said that a derivative work is something
6 tailored only to work with copyrighted software. That's not
7 the law.

8 They said it's something that modifies or
9 extends copyrighted software. That is not the law.

10 That it cannot operate independently of other
11 copyrighted software. That is not the law.

12 This morning I asked Ms. Frederiksen-Cross about
13 JDE World, and she acknowledged that JDE World can only run on
14 a particular version of IBM operating system called AS400. If
15 that were the definition, independent -- cannot operate
16 independently of, it would make a derivative work of JDE World
17 of that operating system.

18 And so what happened -- and you've seen this the
19 last two days, Oracle has pivoted to this what I'll call the
20 #include theory of derivative work.

21 And, again, Oracle obfuscated where things were
22 happening to make it seem like all this copying and merging
23 and compiling and running of code was just everywhere. That's
24 not the case.

25 All of that copying of Oracle code with respect

1 to #include, that is only in the client's environment. It's
2 only when the code is compiled, it's only when the code is
3 run.

4 On Rimini's systems, when it says #include and
5 it has a file name, that's just a reference to an Oracle file
6 so that when later it is incorporated into the client
7 environment and it is run and compiled, then, yes, there is
8 copying that happens that is licensed.

9 But when that Rimini-written file sitting on
10 Rimini's server by itself has a #include, that does not make
11 it a derivative work, that is not substantial incorporation of
12 Oracle protected expression.

13 And you heard Professor Astrachan talk about
14 what the consequences would be to the industry if something as
15 small as the use of a #include to reference some other
16 software external to the file would make it a derivative work
17 of that file. That's how all software works.

18 Now, the other kind of common theme I wanted to
19 hit before we dive into the cross-use issues is that we don't
20 come to cross-use with a blank slate.

21 Your Honor has already made a number of rulings
22 with key portions that bear directly on the issue here today.
23 Your Honor has held in its OSC and in its summary judgment
24 order Rimini II that Rimini is permitted to create the same
25 update file.

1 It can memorize its work product, it can
2 replicate its work. It can reuse work product like test
3 cases. It can develop updates faster. It can perform less
4 testing, use the same test or perform no test at all.

5 Why are we talking about testing reuse, the
6 knowledge of testing? Oracle's counsel just spent a lot of
7 time talking about where's the evidence of testing, where's
8 the evidence of testing.

9 Your Honor has already ruled that Rimini can
10 choose to perform less testing or even no testing so why are
11 they talking about testing?

12 The critical question is not about testing, the
13 critical question is whether Rimini's work product
14 substantially incorporates Oracle expression. That has always
15 been the issue, it is the issue, and so that's what the test
16 for all of these cross-use issues should be.

17 And for every single cross-use issue, for every
18 single file we're talking about, and we'll go through them in
19 a second, there is no opinion and no evidence that those
20 substantially incorporate Oracle code.

21 Okay, issue number 3. Issue 3, as you'll
22 recall, this is a slide, just to kind of orient ourselves, it
23 dealt with a W2 form for Johnson Controls. Some of the text
24 was being cut off in two of the boxes.

25 Now, City of Eugene was affected by the W2 bug.

1 It is the City of Eugene, which is in the State of Oregon
2 which is in the United States. City of Eugene was affected by
3 the W2 bug.

4 Contemporaneous e-mails show Rimini believed the
5 update affected many clients.

6 City of Eugene contracted for updates to federal
7 forms. Rimini was under a contractual obligation to provide
8 federal form updates. Rimini had provided W2 updates year
9 after year after year including for City of Eugene.

10 And Ms. Frederiksen-Cross offered no opinion,
11 and it's cited there, no opinion that City of Eugene did not
12 need the bug fix. Oracle's counsel talked about that as if it
13 was some failure of proof on Rimini's part, but, again, it is
14 not our burden.

15 We actually did affirmatively prove that City of
16 Eugene needed this update, but they can't point and say
17 there's a failure of evidence when their own expert offered no
18 opinion that City of Eugene did not need the bug fix.

19 Here's the testimony of Jim Benge. He said,
20 "This is a federal US form, something all of
21 our clients receive updates for every year. So you
22 know, we had just gone in and made changes in this
23 area and thought that we could have introduced a bug
24 for all our clients. He," that's referring to Don
25 Sheffield, "was working on the development of this

1 for all of the clients that were impacted, City of
2 Eugene being one of them."

3 Again, it's not our burden, but we met that
4 burden. We have proven that City of Eugene needed this
5 update, was affected by this update, and their own expert said
6 that she had offered no opinion to the contrary.

7 E-mails, too, indicate that Rimini believed the
8 bug affected multiple clients. Here are some of the e-mails
9 that we put in evidence.

10 And Professor -- I'm sorry, Barbara
11 Frederiksen-Cross testified that it doesn't matter where
12 Rimini starts the work first, right? They're trying to
13 backtrack from that now, but I asked her,

14 "If City of Eugene and Johnson Controls are
15 both affected by the W2 issue, the misalignment that
16 we saw, do you have an opinion on which client Rimini
17 is required to start its work in?"

18 Her answer was no.

19 "They can start in either one, right?"

20 And, "Presumably, yes."

21 So whether it's two clients or 20 clients,
22 Rimini is entitled to start in any client's environment that
23 it believes is affected by the issue.

24 And, remember, Rimini -- and I talked about this
25 in opening a little bit, Rimini is a consultant. Their

1 clients don't want to be thinking about tax updates. It's not
2 their core competency.

3 Rimini is just expected year after year after
4 year, when W2 forms are put out, to implement the update for
5 its client within the US, for the clients it has a contract
6 with, for the clients that -- the clients expect Rimini to do
7 it for.

8 The clients don't call up Rimini every year and
9 say, "Hey, I need our W2 update." Rimini proactively does it.

10 And so what's striking about issue 3, what's
11 really striking here, is that this is a pure reuse of
12 knowledge situation. This is a pure reuse of knowledge.

13 Jim Benge testified,

14 "So we had a call with the client, and the
15 client actually changed the print parameter for box
16 17 as we've described, and actually tried it out
17 while we were on the phone with them, and confirmed
18 that it resolved their issue."

19 Your Honor, Oracle is contending that that is
20 cross-use, the phone call where Jim Benge had a call with a
21 client, the client typed in B99999 and said, "Hey, Jim, I
22 think it works."

23 They are contending that Rimini is in violation
24 of a federal injunction by having that phone call and talking
25 about B99999 in that print parameter. That's where we are.

1 And, in fact, this is how far she took it. She
2 said, "If Don Sheffield" -- I asked her the question,

3 "If Don Sheffield had figured out the
4 solution for City of Eugene to fix the print
5 parameter, and then his colleague is working in
6 Johnson Controls, and the colleague says to
7 Mr. Sheffield, 'Hey, have you ever dealt with a
8 situation like this,' and he says, 'Yes, actually I
9 have, for City of Eugene, I have changed this print
10 parameter. Go to this field in Johnson Controls and
11 change it to this. I think it should work,' would
12 that be cross-use?"

13 And Ms. Frederiksen-Cross said, "If he gave
14 him the very specific details of exactly what he
15 changed it to, yes, that is knowledge reuse."

16 And you know what's interesting is we went
17 through that same issue again this morning, your Honor, and I
18 asked her essentially the same version of this question, and
19 she flip-flopped. She said it's not cross-use any more.

20 And you saw that actually on redirect, too,
21 where they asked her are any of your opinions based on reuse
22 of know-how, and she denied it, but that's not what she said
23 earlier.

24 And Oracle's cross-use theory would have truly
25 absurd implications. As we saw, Don Sheffield could never

1 reimplement that solution again. He could never tell a
2 colleague about his solution, about his know-how. He could
3 maybe say check the print parameter, but he can't tell him to
4 use the specific value to put in that parameter?

5 And Professor Astrachan testified, "I don't
6 know how they would do that without using the knowledge they'd
7 gained." They would have to reuse their knowledge and
8 know-how. That's what these cross-use issues are about.

9 In this slide, I think this slide puts in stark
10 relief just how much Ms. Frederiksen-Cross contradicts herself
11 and the Court. She said on cross-examination,

12 "I would characterize this as cross-use, the
13 act of reusing the knowledge of the solution."

14 Reusing knowledge of the solution.

15 And then again later she said that would be
16 cross-use -- I asked, "That would be cross-use, right?"

17 And she said,

18 "Yes, if he gave him the very specific
19 details of exactly what he changed to it, yes."

20 And then after all that cross-examination, that
21 was sworn testimony, she comes up on redirect, and there was
22 one question by Oracle's counsel where she was asked,

23 "Are any of your cross-use opinions based on
24 Rimini's reuse of knowledge?

25 "No, I don't believe so."

1 Those are directly in conflict. Either that's
2 false statement on the left or it's a false statement on the
3 right.

4 And the Court's order is clear. The Court's
5 order said it is not cross-use for a Rimini engineer to
6 memorize and replicate the work as Oracle claims.

7 Now, let's turn to issue 4, and this slide again
8 is just to orient us. It's Schedule A of Form 940, and,
9 again, the red arrows indicate the Xs that were misaligned.

10 And to start with, the file at issue is ris940a,
11 and that file is Rimini's work product. We proved that. Jim
12 Benge testified about it, Professor Astrachan testified about
13 it.

14 And Ms. Frederiksen-Cross, like I said before,
15 she did not give an opinion on whether that file was
16 substantially similar to any Oracle code. That's a failure of
17 proof.

18 Rimini doesn't have a burden again. We proved
19 that it's our work product. The burden is entirely on Oracle
20 on this issue, and they have no opinion on it.

21 And then the evidence showed that Rimini tested
22 the update in City of Eugene's environment, and it was for
23 City of Eugene who needed the update.

24 The update, again, is a federal form. City of
25 Eugene is in Oregon which is in the United States. City of

1 Eugene and other clients receive this update every year.

2 On January 25th, 2019, I'll go into the timeline
3 in a little bit more detail in a second, when the testing
4 occurred City of Eugene was slated to receive the update, and
5 it's backed up by numerous documents that show this update was
6 slated to go to all US clients with software versions prior to
7 Oracle release 2018-B, and, again, Ms. Frederiksen-Cross
8 offered no opinion to the contrary.

9 Now, the update was developed and tested for
10 Spherion/Smead. You heard the testimony of Mr. Benge and the
11 testimony of Ms. Davenport as to development and testing.

12 And now here's the timeline, and our timeline is
13 more detailed than the one Oracle's counsel just showed you.

14 Oracle has tried to suggest that the key issue
15 here is about someone named Laurie Gardner, who is not a
16 Rimini developer, and why, after client Spherion logged a
17 ticket with Rimini, the scope in Jira was set to Spherion
18 which would be expected when a ticket comes in.

19 Now, they speculate about what Laurie Gardner
20 saw or knew or intended or heard about the tax publication put
21 out by the IRS. Again, that's burden shifting. Speculation
22 about what Ms. Gardner knew or didn't know, that's not
23 evidence, that's burden shifting.

24 And they speculate without any evidence
25 whatsoever, there's not been a shred of evidence about whether

1 she knew about that IRS instruction that referenced the Virgin
2 Islands, and why -- why? Why does this matter?

3 Look at the timeline here. The timeline shows
4 Oracle's speculation is wrong. In July 2018, documents and
5 testimony show that the update was contemplated for all US
6 clients. January 2019, all US clients were set to receive it.

7 On January 14th, yes, Spherion logged a ticket
8 regarding this update, and, yes, the next day the scope field
9 was set to Spherion to reflect that ticket, but that did not
10 change, it was not indicative of what other clients were
11 expected to receive that update.

12 How do we know that? Because still, on
13 January 25th, the tech doc reflects that the update will go to
14 all US clients. Don Sheffield says he's developing the
15 updates for all US clients that will ultimately get this.

16 The 28th, the business analyst e-mail reflects
17 the update will go to all US clients.

18 So before and after this critical ticket from
19 Spherion that came in on January 14th, the documents and
20 testimony show that Rimini expected that City of Eugene, all
21 US clients were going to get this federal form which makes
22 sense because it's a federal form and these are all US
23 clients.

24 Now, Ms. Frederiksen-Cross accuses reuse of
25 know-how. She tried to disavow that in her redirect, but on

1 cross she was asked,

2 "So even if that Rimini expression -- if the
3 engineer just remembers it, he can't even retype it
4 for Spherion and Smead? That's your opinion?"

5 And she said, "That would be prohibited."

6 And, in fact, this morning I asked her those
7 same questions, and, again, it's been a series of backsliding
8 and changing of positions.

9 I asked can you remember the line code, can you
10 remember this, can you remember that, and she tried to draw a
11 line between, yes, you can remember it but you can't write it
12 down, that's not a distinction, and it directly contradicts
13 your Honor's orders. Your Honor has already ruled that it is
14 not cross-use for a Rimini engineer to memorize the work.

15 So when I asked her can you remember it and
16 retype it, and she said no, that was in contradiction of your
17 Honor's orders. It is irreconcilable with your Honor's order.

18 That takes me to issue number 6 regarding the
19 1099 files. These are the two files, if you recall, rsi1099i,
20 for the 1099 INT, and rsi1099m for the 1099-MISC. Those are,
21 again, obviously both federal forms.

22 Now, both of those files are Rimini created work
23 product. They're Rimini expression. There's testimony from
24 Jim Benge, there's testimony from Professor Astrachan, and,
25 again, a failure of proof. Ms. Frederiksen-Cross does not

1 contend that they incorporate any protected expression. That's
2 the end of the analysis.

3 Rimini did not incorporate Oracle protected
4 expression. They are Rimini work product. And they were
5 developed and tested for Easter Seals in Easter Seals'
6 environments. The documents show that they were.

7 Ms. Frederiksen-Cross offered no opinion on
8 where or when the update was developed other than to
9 acknowledge that it was developed initially pre-injunction.

10 She was asked about this. I asked her a series
11 of questions. She said she's not offering an opinion on
12 substantial similarity. She's not offering an opinion on
13 development. She's not offering an opinion on testing.

14 Again, nothing is our burden here. We have
15 affirmatively proved all these things. Ms. Frederiksen-Cross
16 has not opined on any of them. That's a failure of proof.

17 Now, another key issue with respect to issue
18 number 6 has to do again with the issue of derivative works.

19 And again on the left, I had this in an earlier
20 slide, this is the law. It's clear as day. You have to
21 substantially incorporate protected material from the
22 preexisting work, literal or nonliteral. That is the test.

23 And I asked her a clear and direct question. I
24 asked,

25 "But that file by itself could also be a

1 derivative work even if it contains no literal or
2 nonliteral Oracle expression whatsoever in your view?

3 "That's my understanding, counsel."

4 That is wrong as a matter of law.

5 I asked her when she used and applied that
6 definition in her analysis in this case, and also in Rimini II
7 by the way, and she said yes. That infects every single
8 opinion that she has in this proceeding as well as Rimini II.

9 And so, again, facing a failure of proof, where
10 did Oracle turn this morning? They turned to #include again.
11 They said #include. But #include does not incorporate any
12 Oracle expression until the file is run in the client's
13 environment.

14 Again, the #include in the RSI file is just a
15 single line. It says #include, and then it references a file
16 name. That's it.

17 It's only when that file is sent to the client,
18 compiled and run, is Oracle code even involved in the process.
19 Professor Astrachan explained this, and eventually
20 Ms. Frederiksen-Cross admitted this. It's a red herring.

21 Now, I turn to Issue 10. This had to do with
22 the issue for Rockefeller and Home Shopping Network.

23 Now, that update involved 13 steps. It was --
24 and one step was integrating the rsi quarter tax file which,
25 again, contains no Oracle copyrighted expression.

1 Ms. Frederiksen-Cross did not contend that it contained any
2 Oracle copyrighted expression. Again, it's a failure of
3 proof.

4 And you saw the Dev instruction. We went
5 through it in painstaking detail. It was extremely long. I
6 believe it had 13 steps, it was dozens of pages long,
7 incredibly complex. It had tons of Rimini-written code in it,
8 all Rimini creative expression.

9 There is not a single opinion from Oracle in
10 this case that that Dev instruction contains any Oracle
11 expression or is substantially similar to any Oracle
12 expression. It is Rimini's work product, and Rimini can use
13 it, yes.

14 And you saw the testing records. The testing
15 records show that Rimini tested it in Home Shopping Network's
16 environment for Home Shopping Network; in Rockefeller's
17 environment, for Rockefeller.

18 And so then where did Oracle go faced with this
19 evidence? They went to what I'm calling a retroactive
20 cross-use theory.

21 I asked Ms. Frederiksen-Cross,
22 "So if Rimini has just one client, and
23 they're -- we hope to get more clients, we're not
24 sure, and if they do end up getting clients, then
25 somehow it makes the prior use of that first client's

1 environment cross-use?"

2 And her answer was, "That's my understanding
3 just under the way the language of the injunction is
4 framed."

5 Oracle's theory is so expansive that cross-use
6 somehow runs backwards in time to RAM copies in the first
7 client's environment that no longer exist, so that if Rimini
8 gets a new client next year and reuses its know-how and work
9 product developed in the first client's environment using that
10 first client's software, and therefore there were RAM copies
11 in that first client's environment, those RAM copies are long
12 gone. They've been gone for a year.

13 But somehow Oracle's cross-use theory is so
14 expansive that it retroactively makes the use of those copies
15 in the first environment somehow illegal, and, again, because
16 the injunction, it's undisputed, only covers illegal conduct,
17 it makes it illegal for anyone.

18 Now, let's turn to issue 2. Again, this slide
19 is to just orient us again. It's the same Schedule A of Form
20 940, it's got the boxes and the Xs that are misaligned.

21 This update was developed for Matheson. The
22 documents show that. It was tested for Matheson. Yes, this
23 is an Apply Update log that shows that the update was sent to
24 Matheson.

25 But there was the testimony of Jim Bengé about

1 it being tested for Matheson, and Mr. Bengé testified,

2 "At the time of this informal delivery to
3 Matheson Trucking, did you believe you were violating
4 the injunction?

5 "No, not at all.

6 "Why not?

7 "The work that was done here was for
8 Matheson in Matheson's environment."

9 So, again, while we are not rearguing the
10 violation, Rimini did not believe it was in violation of the
11 injunction at the time that this happened and should not be
12 held in contempt because the work for Matheson was in
13 Matheson's environment. The work for City of Eugene was in
14 City of Eugene's environment.

15 And when you look at whether it's developments
16 or testing or Rimini expression where the work product at
17 issue, that rsi quarter tax or rsi940 or rsi 1099s, the Rimini
18 expression, we have proven all of those. Again, it is not our
19 burden, we don't have a burden here.

20 But Oracle has failed. Her opinions --
21 Ms. Frederiksen-Cross hasn't even offered opinions on whether
22 these files substantially incorporate protected Oracle
23 expression, and that's the critical issue here, and Rimini
24 should not be held in contempt for any of these.

25 And I want to turn to issue numbers 7 and 9.

1 These are the two issues regarding JDE source code.

2 Here's the injunction language. "Rimini shall
3 not copy JD Edwards software source code."

4 And here's a demonstrative I showed in opening
5 and you also saw during the testimony of Mr. Lanchak.

6 And the red and the green depict the two
7 portions of JDE software.

8 And what's critical with this slide is that,
9 yes, Oracle doesn't like the labels for some reason, but they
10 are not disputing the fact. It's not the term that matters,
11 it's the fact.

12 I asked Ms. Frederiksen-Cross about whether the
13 green portion was accessible human-readable, and she said yes.

14 I asked her about whether some of the components
15 of the software of JDE is not easily accessible and not
16 human-readable, right, that's the red portion.

17 And I have to say Oracle's counsel said that
18 these terms were made up, that they've never been used. The
19 documents I referred to in the proffer earlier show that that
20 is not the case.

21 Now, critically, Oracle showed you the jury
22 instruction for Rimini I, and I want talk about that, because
23 the Ninth Circuit has already held that creating JDE software
24 environments which necessarily, necessarily, includes open and
25 closed code, is permissible under the JDE license.

1 That's the Ninth Circuit saying that the
2 Rimini -- the JDE license does not prohibit Rimini from
3 creating JDE software environments.

4 JDE software environments, it is undisputed,
5 contain both the open accessible portions and the closed
6 inaccessible portions.

7 And your Honor also heard testimony just this
8 morning about the Giant Cement JDE license, and there was a
9 reference to source code, and what it referred to was the
10 closed code, consistent with Rimini's interpretation. It
11 referred to source code in the context of not decompiling, not
12 reverse engineering, not disassembling.

13 And so this slide is critical because the Ninth
14 Circuit, it affirmed your Honor's instruction, and it said
15 that when your Honor construed the JDE license, it would not
16 preclude Rimini from creating a development environment for a
17 licensee, for JDE.

18 And, again, it is undisputed that JDE contains
19 both open and closed code so you cannot create a JDE software
20 environment without copying both of those components.

21 There's also been a lot testimony and evidence
22 about Spinnaker, and this is Ms. Ransom. She was the Senior
23 Global Vice-President of Customer Support for Oracle, and she
24 was asked a series of questions about Spinnaker's processes.

25 And she was asked,

1 "And Oracle viewed them as respectful and
2 noninfringing of Oracle's intellectual property?"

3 And she said yes.

4 "And also that the support processes
5 described in paragraph 14 do not violate Oracle
6 license agreements with its clients."

7 And she said correct.

8 And what is intriguing is that Oracle's counsel
9 didn't even provide Ms. Ransom's testimony to
10 Ms. Frederiksen-Cross. I asked her about that.

11 She wasn't really aware of what the details
12 were. Oracle shielded their own corporate representative's
13 interpretation of the license at issue from their expert who
14 is here to talk about what is and is not permitted under the
15 license in the injunction.

16 And, again, this is not -- I'll go to this next
17 slide first. So she was also asked the question,

18 "And is it fair to say that Oracle concluded
19 that it was proper for Spinnaker to develop fixes,
20 updates, and custom code solutions -- " that's the
21 open code -- "for its customers that may take the
22 form of source code changes?"

23 Her answer was yes.

24 Again, that is the open code that we are talking
25 about.

1 And I said this in opening, we're now here in
2 this proceeding and Oracle is saying the exact opposite. They
3 don't say that out in the real world. They don't say that --
4 now they're saying that the injunction, which only covers
5 illegal conduct, prohibits the copying of Oracle code.

6 But out in the world, to its licensees, to its
7 partners, to its support providers, to all the consultants
8 that are literally modifying -- you heard them from
9 Mr. Lanchak, modifying and copying JDE code, this open code,
10 they don't tell them that that's prohibited.

11 And Oracle's assistant general counsel, Deborah
12 Miller, was part of that audit, it was an onsite audit at
13 Spinnaker's processes, and it was concluded that Spinnaker's
14 practices and procedures are respectful of and do not infringe
15 Oracle's intellectual property rights and do not violate the
16 license agreements.

17 Now, everyone, all the experts and I think all
18 the lawyers, agree that Oracle's theory would prevent support
19 providers from copying, checking out, displaying, checking in,
20 promoting, using tools, or doing anything with JDE code.

21 And the reason is, is because, in the digital
22 world, you cannot interact with a file, you can't even look at
23 a file without copying code. It's impossible. You can't look
24 at a file without copying code, let alone modify it, let alone
25 create an update.

1 I asked Ms. Frederiksen-Cross,
2 "All of those involve copying of what you
3 contend is JDE source code in the client's
4 environment, correct?"

5 The answer was yes.

6 Mr. MacKereth agreed. Mr. Lanchak agreed. You
7 cannot do anything without copying the JDE code.

8 And, again, I've said this before, but your
9 Honor has been crystal clear. The injunction only enjoins
10 conduct that has been adjudicated unlawful. If it's unlawful
11 for Rimini, it's unlawful, period. It's unlawful for
12 everyone.

13 And so if the injunction is interpreted to mean,
14 as Oracle wants, that any and all code, even the open code of
15 JDE that is shipped with the product that is designed to be
16 modified, that Oracle provides tools to modify it, and that
17 has to be modified to keep the software up to date, if that is
18 enjoined, if that is illegal, it would make the JDE support
19 industry suddenly illegal.

20 And Mr. Lanchak, who again is the only person
21 who you've heard from, with decades of experience actually
22 implementing Oracle software implementations and maintaining
23 Oracle software and many years of JDE support specifically,
24 that was his testimony.

25 Now, Oracle has tried to suggest that this is

1 made up, that it's some new-fangled -- I think the word was in
2 opening, new-fangled explanation, some new distinction without
3 a -- that Rimini has never used before, but the timeline
4 disproves that.

5 Now, they put up a timeline, but, you know, they
6 keep leaving critical things out.

7 So the injunction was originally issued in
8 October 2016, was stayed roughly two months later in December
9 2016, and then they did have the portion on 1/8/2018, the
10 portion in black where it says the original injunction was
11 vacated.

12 But, you know what they left out? They left out
13 that the Ninth Circuit held Rimini can create JD environments.
14 You cannot create a JD environment without copying both the
15 open and closed portions of the code.

16 And they also left out the testimony of
17 Ms. Ransom four days later. She is the 30(b)(6) corporate
18 designee of Oracle. She said that source code changes and
19 custom code are permissible.

20 So this is not some made-up story. This is not
21 some new-fangled distinction. These are facts. The fact of
22 the distinction between open and closed, whether you like the
23 terms or not, or whether Oracle likes the terms or not, that
24 doesn't matter. The facts matter.

25 The Ninth Circuit has held that Rimini can

1 create JD environments, and that necessarily requires copying
2 open code.

3 Now, I also talked in opening about the
4 superfluous argument. Again, this is Oracle's attempted
5 rewrite of paragraph 8.

6 If Rimini Street can't copy any and all JDE
7 code, even accessible code, it renders the rest of paragraph
8 10 you see here at the bottom superfluous.

9 It would be a ban on providing updates so it
10 wouldn't matter -- that portion of paragraph 10 where it says
11 you can't create updates for the benefit of some other
12 licensee, that would be totally superfluous if paragraph 8 is
13 read as Oracle says.

14 Now, on issue 9, issue 9 concerns the single
15 technical specification at issue, and this issue is moot if
16 the Court finds that Rimini is allowed to access and copy open
17 code to create these markers in the red box.

18 But those markers aren't code at all.
19 Mr. MacKereth testified about that. Professor Astrachan
20 testified about that. I believe even Ms. Frederiksen-Cross
21 testified that these can't be run, these aren't code, they're
22 markers, and no one disputed the purpose of them.

23 That code already exists, or the snippet of
24 code, I should say, already exists in the client's
25 environment. It's used as a frame of reference, a pointer was

1 used, an indicator the term was used, a marker the term was
2 used. That is the purpose.

3 And it is undisputed, again, there is no opinion
4 from Ms. Frederiksen-Cross, or evidence to the contrary, that
5 the code in this blue box and the many, many, many, other
6 boxes that have the word "add" in them in this technical
7 specification, that is Rimini-written code. That is Rimini
8 expression, and the fact that there is a snippet, a marker to
9 indicate where to insert that code in a client's environment
10 does not violate the injunction.

11 And Professor Astrachan, he talked about this,
12 he talked about their purpose, he talked about how it can't be
13 executed and it's not even code.

14 And, again, there was no opinion from Oracle
15 that these were somehow substantially similar to any Oracle
16 expression, and Professor Astrachan talked about and explained
17 how it was *de minimus* in any event.

18 And here's the testimony from
19 Ms. Frederiksen-Cross on this issue. She agreed that the
20 snippets are used merely as markers and cannot be executed.
21 She agreed that Rimini wrote the code to be added, and she
22 failed to conduct a substantial similarity analysis.

23 Again, it is not our burden. We have presented
24 affirmative evidence that that is our code, but it is not
25 disputed, and Oracle has a failure of proof issue on all of

1 these that require an analysis of substantial similarity.

2 Now, I want to briefly talk about issue 8. I
3 don't believe Oracle's counsel even raised it during their
4 closing. Issue 8 relates to the Australian Bureau of
5 Statistics, ABS I'll call them. That's a client in Australia.
6 ABS uploaded a single database file to Rimini.

7 Oracle's expert admitted she did not disclose
8 any opinion regarding database. She was asked,

9 "You have never disclosed any opinion in any
10 of your reports about this file as it relates
11 specifically to paragraph 15 of the injunction,"
12 that's regarding database.

13 Her answer, "That's correct."

14 And she admitted that she did not take into
15 account the Court's OSC. She was asked,

16 "You didn't take into account the Court's
17 order on this paragraph in forming your opinions?"

18 And she said, "I do not recall that in
19 forming my opinions."

20 And what's she's referring to there is, your
21 Honor, I had asked her a question about whether she had
22 remembered that your Honor had written in an order that in
23 context that paragraph 15 did not mean that all copying of
24 Oracle database was now prohibited, that the injunction had to
25 be interpreted in the context of this now decade plus

1 litigation, and your Honor had written explicitly that given
2 that lengthy history, clearly the injunction would not
3 prohibit all copying of Oracle database.

4 And she did not take that into account in
5 forming her opinions in her case, therefore her opinions are
6 unreliable. She actually didn't have opinions until this
7 hearing, but, in any event, they're unreliable.

8 They're also wrong because the paragraph 15 of
9 the database -- of the injunction relating to database says,

10 "Rimini Street shall not reproduce, prepare
11 derivative works from, or distribute Oracle database
12 software."

13 And so I asked her, "I don't know what your
14 theory is. What is your theory?" I said, "What's
15 your theory as to why this violates paragraph 15 of
16 the injunction?"

17 And her answer was, "Because it's a copy of
18 the file that is present on Rimini's systems."

19 In other words, she's saying that there's some
20 local hosting prohibition, an implied one, a silent one that
21 doesn't exist in the text, despite the fact -- again, I've
22 shown this slide before -- that there is no facilities
23 restriction in the OLSA.

24 And the Ninth Circuit -- I've shown this
25 before -- says that only the PeopleSoft license limits the

1 licensee to using the licensed software at its facilities
2 which is the basis for the local hosting requirement. The JD
3 Edwards and Seibel licenses don't, and that's why the Ninth
4 Circuit struck those provisions.

5 Oracle is trying to imply a local hosting
6 prohibition as to database, and it doesn't exist.

7 Now, I have a very short section on how Oracle's
8 interpretation grossly distorts the junction. It's a
9 text-heavy slide, I admit, I won't go through every piece of
10 it.

11 But to recap, Oracle is saying that client-sent
12 files weren't contempt when the Rimini I conduct was about
13 environments.

14 They're saying that with respect to local --
15 with respect cross-use, and the words "for the benefit of,"
16 that support providers cannot reuse know-how and work product.

17 They try and sidestep it sometimes. On redirect
18 she claimed otherwise, but there was clear testimony from
19 Ms. Frederiksen-Cross that she was accusing as cross-use the
20 reuse of knowledge.

21 With respect to JDE, again, Oracle is claiming
22 that support providers can't view, look at, check out,
23 display, check in, or promote any JDE code, and as to database
24 they imply a local hosting prohibition that doesn't exist.
25 It's nonexistent.

1 Now, I wanted to zoom in a little bit on
2 cross-use, though, again, and I think this point is critical.

3 Rimini should not be held in contempt when
4 Oracle's own expert can't keep Oracle's theories straight and
5 doesn't even know what's allowable. She's changed her views.
6 Ms. Frederiksen-Cross has flip-flopped back and forth about
7 know-how.

8 It was acknowledged that there is such a thing
9 as allowable cross-use. That was the testimony. There is
10 such a thing as allowable cross-use, but we don't know what it
11 is.

12 Ms. Frederiksen-Cross said that Rimini can't
13 reuse knowledge but then said the opposite. I went through
14 that. On cross she said you can't, on redirect she said you
15 can.

16 There was a repeated flip-flop on intent,
17 whether somehow there's some intent element to cross-use.

18 All these issues are up in the air.

19 Ms. Frederiksen-Cross couldn't keep Oracle
20 counsel's theories straight about what is and is not
21 permitted, and so Rimini can't be held in contempt when their
22 own expert doesn't know, when it can't be articulated.

23 And that last bullet on the left I think is an
24 important one because there was a glimmer of lucidity there,
25 and there was testimony by Ms. Frederiksen-Cross where she

1 eventually said correctly that the line, the critical line
2 here for cross-use is does the work product substantially
3 incorporate protectible Oracle expression.

4 That is the key to unlocking all of these
5 cross-use issues. That's the key issue when it comes to
6 cross-use, and there's been a failure of proof onto each and
7 every one of these cross-use issues.

8 I want to briefly touch on the substantial
9 compliance efforts.

10 Now, Oracle has claimed from the opening,
11 through testimony, and now in closing, that the only two
12 things that Rimini did was to stop using two automated tools,
13 and there was references to Co-Analyzer and DevReview.

14 They want to rehash the entire history of this
15 litigation when it serves them, but then they want to ignore
16 the history of this litigation when it doesn't. And so what
17 didn't they talk about? They don't talk about Process 2.0.

18 Your Honor's summary judgment order in February
19 2014 provided guidance, and what did Rimini do? It followed
20 that guidance. It spent months and millions of dollars moving
21 all of its client systems off of its environment.

22 For some reason they don't count that, it
23 doesn't count. If it didn't happen within the days after the
24 injunction it somehow doesn't matter.

25 But Process 2.0 we specifically designed to

1 address the issues your Honor had identified in February 2014.
2 So seven years ago Rimini took steps to comply and order its
3 conduct in response to your Honor's instruction in that
4 summary judgment order.

5 And Oracle also didn't acknowledge that Rimini
6 does instruct clients to not send Oracle IP to them. We saw
7 that. Again, that was the column that was missed apparently
8 inadvertently, even though the column was labeled Important,
9 even though the column -- even though there was testimony by
10 Ms. Frederiksen-Cross that she reviewed each of the column
11 headers.

12 There was testimony from Mr. MacKereth about
13 scanning and quarantining and discipline, and Oracle wants to
14 just eliminate that, zero it all out.

15 And they pretend -- I'll just show it one more
16 time. These are the only two things they think happened, but
17 they're not saying the whole story. They're refusing to
18 acknowledge these things on this slide, Process 2.0, scanning,
19 quarantining.

20 And then I want to just briefly address -- I
21 know Oracle's counsel didn't address it in his last few
22 minutes, but I can't let it go unaddressed a little bit.

23 Their request for Rimini here is essentially a
24 monitorship. That's unprecedented and it's contrary to law.

25 They withdrew their request for a bar order,

1 your Honor will remember. It said -- your Honor wrote Oracle,
2 in its response to the motion, withdrew its request for a
3 complete ban on Rimini support services. But what they're
4 doing is they're essentially seeking one again through a
5 backdoor by saying all copying is illegal with respect to
6 database and JDE.

7 There was this testimony on database where it
8 was asked of Ms. Frederiksen-Cross, it says,

9 "It says Rimini shall not reproduce Oracle
10 database software. What's your understanding of
11 that?

12 "That they shall not copy.

13 "Ever?

14 "Oracle database software, that would be my
15 reading of it, yes."

16 That would be a ban, that would be a bar on
17 providing Oracle database support.

18 And as to JDE, she was asked,

19 "All of those things involve copying of what
20 you contend is JDE source code in the client's
21 environment, correct?

22 "ANSWER: Yes."

23 Again, that would effectively be a bar on
24 providing JDE updates, any meaningful -- in the broadest sense
25 of the word, any meaningful support.

1 You heard the testimony of Mr. Lanchak, the only
2 JDE expert in this case, it would prevent meaningful JDE
3 support. It's effectively a bar order. So while they say
4 they withdrew it, they come back to it a different way.

5 And Oracle is effectively seeking perpetual
6 discovery. They don't want this to end. Rimini is under the
7 yoke of them. They want perpetual discovery, and not just of
8 any, you know, litigant adversary, it's of its biggest
9 competitor.

10 They want essentially a monitorship. If you saw
11 the things in the opening slides that were presented to your
12 Honor from Oracle's counsel, it had a whole litany of things,
13 essentially a monitorship.

14 That requires statutory authorization. The
15 Copyright Act does not authorize it. There's no inherent
16 power absent this heightened showing, and there's serious
17 constitutional concerns with it.

18 And with that, your Honor, I'll conclude.

19 Rimini respects Oracle's IP, and it respects
20 your Honor's orders. It fundamentally changed its processes
21 more than seven years ago.

22 It has interpreted the injunction consistent
23 with the Court's ruling that permits lawful support, yes,
24 including the reuse of its own know-how and work product, and
25 that Rimini is in substantial compliance, and we respectfully

1 ask that at the end of this your Honor discharge the OSC.

2 And thank you very much again for your time.

3 THE COURT: Thank you.

4 (Discussion held off the record.)

5 THE COURT: Mr. Isaacson, with that, we'll go
6 ahead and turn to Oracle's reply closing argument.

7 MR. ISAACSON: Thank you for this last ten
8 minutes. We have the opportunity to propose trial briefs so I
9 don't have to touch on everything that was just said over the
10 last hour, but I will say that this is not about burden
11 shifting, of course it's not.

12 I laid out for you in detail significant proof,
13 clear and convincing proof of not just the violations but of
14 the overall attitude, contemptuous bad faith, and the fact
15 that these are all tied to business practices which indicates
16 that what is happening here are not just the ten violations
17 but practices that are going to continue and be the foundation
18 of part of aspects of the business model that are dependent
19 upon copyright violation and violation of this court order.

20 The last thing that was just said, we are in
21 substantial compliance because we have Process 2.0.

22 Seth Ravin explained in his testimony that the
23 Process 2.0 which was adopted before the injunction, as I
24 said, consists of no more PeopleSoft environments, no more
25 general environments on the Rimini system, and we have -- and

1 they were operating remotely. That's it.

2 He said we give warnings. They are boilerplate
3 warnings. They don't respond when they get these materials;
4 please stop.

5 He said we have scanning. Their witness,
6 Mr. MacKereth, said they adopted that about a year ago.

7 He said they have quarantining, which their own
8 expert said, "I couldn't see it," and then Mr. MacKereth said
9 there's quarantining, and he pointed to only two Salesforce
10 files.

11 They said, "We have discipline." And Mr. Bengel
12 said he only knows of two cases, maybe there's a third, and,
13 in all the cases he said there were violations of their
14 policy, he could not identify any of that discipline.

15 I began with JDE because it exemplifies what's
16 going on here. They rewrite the injunction, they ignore the
17 plain words, and they do that in order to commit copyright
18 violations that are now happening after a jury verdict and
19 after an injunction.

20 Remarkably he stood up here and said the Ninth
21 Circuit says we can create JD environments, and, of course,
22 what did the Ninth Circuit do? It maintained your injunction
23 except for the words "access," which has been blacked out, but
24 otherwise the provision of the injunction with respect to JDE
25 remains the same, and the plain language of that says no

1 copying of source code.

2 And he stood up here and said, yes, source code
3 is human-readable code. Open code is human-readable, closed
4 code is not, and that, of course, is object code.

5 The plain language of the injunction, which they
6 never came to this Court to seek to modify or clarify or make
7 any of these arguments, instead they contemptuously violated
8 the plain language of that injunction, says they are not
9 entitled to do what they are doing.

10 There is no explanation that you heard of what
11 happened at the trial. How could that trial have been about
12 closed code that Rimini never used?

13 There was no explanation of what is the purpose
14 of an injunction after a jury verdict if it's about enjoining
15 something that Rimini did not do and can't do.

16 The Giant Cement license agreement, which was
17 also touched upon, he said -- he seemed to imply it doesn't
18 talk about source code, it talks about compiling, and there
19 are sections on that.

20 But the relevant provision in your summary
21 judgment order, which is under Article 2, Sub 3,

22 "For any access to the software other than by
23 an employee of a customer, customer shall not provide
24 access to source code."

25 That's what you relied on in your summary

1 judgment order, source code in the license, source code in the
2 summary judgment order, source code in the injunction, and
3 that's what they're violating.

4 They're doing the same thing with respect to
5 violation 9 trying to rewrite things which are those tech
6 specifications for JDE where you have markers, where they are
7 using Oracle code for the makers, but they say that's okay
8 because it's not executable source code. That's not what the
9 injunction says. It's another example their rewriting things.

10 On Issue 1, all that Oracle copyrighted
11 information on the Rimini systems, he said that it's all
12 Oracle database which is not what happened.

13 What it said was that they were systems that use
14 Oracle database which includes the other products such as
15 PeopleSoft which, as the Court may remember, everything
16 interacts with Oracle database.

17 There were 934 instances of this type of content
18 on Rimini systems confirmed by Professor Astrachan who said he
19 read the individual Salesforce files on that, and he said it
20 was confirmed by Rimini's assistant general counsel who told
21 them they already knew about that exact number before Barbara
22 Frederiksen-Cross told them about it.

23 Issue 5, which is -- basically comes down to
24 analytic dissection, I'm not going to repeat the debate that
25 went on today. You heard whole debate about the specifics of

1 analytic dissection.

2 But counsel never confronted the Catch-22 of
3 what they want you to accept from Professor Astrachan, that
4 all code -- software code should be considered to be
5 conventional, and all conventional code should be weeded out
6 by analytic dissection, and nothing should be protected, and
7 therefore we can violate the injunction to our heart's
8 content.

9 The injunction does not permit that because
10 they've waived any type of argument at the trial that this was
11 not original protectible content.

12 The jury was instructed, the violation was
13 found, the injunction was entered. They don't get to say we
14 get to copy to our heart's content and come in with analytic
15 dissection.

16 In addition, his analytic dissection method had
17 no basis in any literature, as he agreed, he made no speeches
18 about it.

19 He's a remarkably qualified computer scientist,
20 but he's just got this side gig about analytic dissection that
21 has nothing to do with his work. How could it? His method of
22 analytic dissection would make all software not copyrightable
23 because he expects it all to be conventional.

24 With respect to violations 2 through 4, which
25 this is Form 940, Exhibit A, which went to Spherion/Smead and

1 then Matheson, and then there was a bug fix for Johnson
2 Controls, the Spherion -- all of this took place over a single
3 weekend in January 2019, and it also however said, as
4 Mr. Benge said, it represents a business practice because they
5 feel free to do this.

6 And what -- just like Mr. Benge, just like
7 Professor Astrachan, they said this was permissible for all
8 clients on January 25th, but the record says clear and
9 convincingly that the test took place on January 24th, and on
10 January 24th the only -- the only client in scope was
11 Spherion. That's what it says.

12 And it is also undisputed, and, you know,
13 counsel said we were speculating, it's not speculation that
14 the documents -- and Mr. Benge said the reason they went to
15 City of Eugene was because they did not have access to
16 Spherion and Smead. It's not because they're trying to help
17 City of Eugene, they don't have access to help the clients who
18 are complaining so they rush over to the easy environment.

19 They say, well -- they said some things about
20 the AS400 and operating systems which have nothing to do with
21 the PeopleSoft environments or the PeopleSoft updates.

22 But on this issue of derivative works, we have
23 applied the standard of substantially incorporating protected
24 material.

25 First, a derivative work is not necessary. A

1 modification violates the injunction. The Court has held that
2 in its summary judgment order in Rimini II.

3 Second, the files in these violations and in
4 violation 6 are derivative works using the analysis of the
5 Court of derivative works in its summary judgment ruling when
6 it applied the *Microstar* decision.

7 Third, the PeopleSoft environments are also
8 derivative works in the customer environments. Professor
9 Astrachan says that.

10 He says, however, he thinks that's legal, but
11 they are not because they're a breach of paragraph 2 of the
12 injunction because they violate the underlying Easter Seals
13 injunction which says Easter Seals can't create derivative
14 works.

15 It can -- issue 3, Johnson Controls, he says,
16 well, Johnson Controls needs this, there's lots of evidence.
17 The document says it will depend on what they report -- I'm
18 sorry, he said the City of Eugene needed it, that it was
19 applied given Johnson Controls.

20 The document says it will depend on what they
21 report. City of Eugene did not report a bug, Johnson Controls
22 did. That's why they used the City of Eugene to help -- to
23 help Johnson Controls.

24 They say that Ms. Frederiksen-Cross is talking
25 about now the cross-use of knowledge, which is not correct,

1 because it was Johnson Controls that identified a problem,
2 that Rimini Street went into the City of Eugene environment to
3 identify a solution to that problem, and then they typed that
4 solution into Johnson Controls. That's cross-use.

5 And, finally, with respect to Issue 10, the
6 whole -- that long thing about the Dev instructions which was,
7 you know, almost an hour of talking about all these steps in
8 Dev instructions, and he mentions it again, is irrelevant
9 because it was sent to Home Shopping Network -- the update was
10 sent to Home Shopping Network and Rockefeller after
11 development. Rimini provided an update that it developed
12 earlier to the future customers.

13 He says, well, cross-use can't run backwards,
14 it's a straightforward application of the injunction because
15 the injunction uses the term solely. It is not solely for the
16 benefit of client A if it is being done for future clients.

17 The injunction talks about it has to be for the
18 benefit of that client A. It is not for the benefit of client
19 A if it is for future clients.

20 What I have said about what Rimini has done and
21 not done shows bad faith, contempt, a lack of substantial
22 compliance, and ten violations of the injunctions.

23 But it's not just about those ten things, and
24 counsel was silent about whether somehow these were some ten
25 discrete things or ongoing business practices. That's why you

1 didn't hear even a whiff of an apology for a single one of
2 these things.

3 They are not taking steps to enforce this
4 injunction, they are taking steps to internally say we're
5 going to change this injunction ourselves.

6 They changed the injunction prohibition on
7 copying JDE source code to nullify it because Mr. MacKereth
8 said he thought reading the injunction to cover the conduct
9 that was held illegal at trial would be incredulous, and
10 Rimini didn't come to this Court to ask permission to do that.

11 The company that built itself from copyright
12 violations, I'm not just talking about history, I'm talking
13 about today, now says that JDE business -- its JDE business
14 requires it to violate the plain language of a court order
15 which is not what it said when the junction was first entered.

16 We know that Rimini has 930 files on its system
17 with Oracle copyright notices. That's evidence of lack of
18 substantial compliance. We know their assistant general
19 counsel knew about that.

20 And we know the violations here are not
21 isolated. The hearing has revealed it's based on business
22 practices, and business practices that they continue to
23 defend, informal testing -- informal delivery to deliver
24 updates by testing from easy environments, delivering testing
25 updates in an easy environment that's not solely for a client,

1 using technical documents with Rimini code as markers.

2 The ten violations in this hearing have
3 uncovered fundamental ways that Rimini is doing business that
4 violates this injunction.

5 This is not going to stop without serious
6 attention from this Court. It's not just about the ten things
7 because the ten things -- each of the ten things, or most of
8 the ten things, represent serious business practices.

9 Rimini right now feels free to say that the
10 provisions of the junction are incredulous and then do what it
11 wants.

12 It will announce after the orders of the Court
13 again that it need do nothing else to comply with the court
14 order as it did before if something isn't done.

15 It won't compete fairly. It will do so by
16 conduct in violation of a court order if something isn't done.
17 These are very serious matters, because we are discussing a
18 jury verdict, an injunction affirmed on appeal, and Rimini
19 rewriting that to help itself in the marketplace.

20 Nothing has fundamentally changed with Rimini.
21 It reveals its business practices only when there's a trial or
22 a hearing. It builds its business on copyright violations and
23 now violations of court orders.

24 We ask the Court to find Rimini in contempt and
25 to take serious action to address those violations.

1 And, once again, I thank the Court for its time
2 this week, and I also thank everybody here who has been
3 working very hard.

4 THE COURT: All right. Well, I'll extend an
5 appreciation to both counsel. You have done a fine job
6 summarizing your clients' cases, and I appreciate the
7 professionalism that I've seen throughout the trial, and
8 Mr. Vandavelde and Mr. Isaacson, you have reflected that in
9 your closing statements.

10 A couple of things. First of all, I had earlier
11 approved a three-week period from the end of this hearing to
12 submit proposed findings and conclusions of law.

13 Madam Clerk, why don't you give me that
14 three-week date so that we have a specific deadline in mind.

15 THE CLERK: That would be Tuesday, October 19th.

16 THE COURT: All right --

17 THE CLERK: I'm sorry -- yes.

18 THE COURT: Yes, I think that's correct.

19 That will be the date for that, and, Madam
20 Clerk, I apologize for not asking you to think about that
21 earlier.

22 Let's see. I assume that the slides which have
23 been referred to by counsel in argument are going to and have
24 been made a part of the record here somehow. I'd like to have
25 them as part of the record if they haven't been so submitted.

1 Madam Clerk --

2 MR. ISAACSON: We handed up our copies.

3 MR. VANDEVELDE: We did, too, and we're happy
4 to -- we're planning to lodge a copy as well, your Honor.

5 THE COURT: All right. And that takes us to the
6 other question that was raised earlier about trial date for
7 Rimini II. Do you want to tell me what you're concerned about
8 there?

9 MR. VANDEVELDE: I'm happy -- do you want to
10 start, Bill?

11 MR. ISAACSON: I don't have much to say --

12 THE COURT: I don't mind telling you there's
13 been an obvious hold by the Court, so to speak.

14 I'm sure everyone is aware what the problems are
15 with the COVID-19 pandemic and trying to have jury trials, and
16 I can tell you that it's been a jungle in trying to preserve
17 jury trials for our criminal cases.

18 You can imagine how they're backed up and the
19 complications that that has caused because under the federal
20 system there are -- most defendants are being held in custody
21 pending their criminal charges in cases, and I -- it's just
22 part of the way things are.

23 On the issue of civil cases, we start with the
24 obvious proposition that this case is definitely unique in the
25 sense that it, like the earlier trial, I foresee a trial which

1 easily could go a month, and with the jury under current
2 pandemic conditions, which have only gotten worse in the last
3 month, I'm really hesitant to schedule and be looking at that
4 date.

5 I can tell you I have other complex civil cases
6 that we have actually set trial dates on, and jury trials, and
7 as I sit here -- when I started this case, I mentioned the
8 double murder trial that we had last month, and we were able
9 to get the jury for that, but it was only a week and a half
10 trial at the same time, but -- and that was not an easy
11 proposition and actually COVID has gotten worse since that
12 trial.

13 So I'm -- I'm just giving you that as
14 background. I haven't signed off on the pretrial order in
15 this case. We pretty much have what the parties have
16 submitted, and I probably will accept it on that basis without
17 adopting any particular party's position.

18 But all of that stated, let me hear from
19 counsel.

20 MR. VANDEVELDE: Your Honor, I have made a
21 proposal, which there's obviously large casts on both sides.
22 We have most of our team here although we are missing one of
23 our key members. I can't speak on his behalf.

24 I would suggest that maybe we take this offline.
25 We can talk about those and maybe come up with some dates in a

1 range. I think there's at least some range that we're largely
2 targeting next year, and hopefully we can come to an
3 agreement.

4 It would be very hard for me to represent right
5 now that would work given --

6 THE COURT: Yeah, I'm not trying to pin anyone
7 down. I just want you to appreciate the problem from the
8 Court's perspective.

9 MR. VANDEVELDE: I totally understand.

10 MR. ISAACSON: You know, we obviously understand
11 those problems and how they come first, your Honor.

12 And to be totally transparent, the last
13 conversation, which was some time ago, I don't even remember
14 when, quite frankly, hopefully the vaccination rate was lower
15 then, but I don't know, we were talking about April, not
16 anybody agreeing to that, but talking about that, and whether
17 we should set that and then see how things go.

18 But I don't know if that's how -- that's sort of
19 the way the Court wants to proceed, if we're able to agree on
20 some date range or date.

21 MR. VANDEVELDE: Yeah. Again, I believe the
22 conversation was with Mr. Thomas who I can't speak on behalf,
23 and he's our lead trial counsel.

24 I know there are trials, in fact, I have one in
25 May and March, and I know there are other conflicts. I think

1 we can thread the needle somewhere towards early summer,
2 midsummer, that's what we were targeting, but I think there's
3 common ground for us to discuss, and I think it's easier done
4 via phone calls than in open court.

5 I just note that there's lots of --

6 THE COURT: No, I'm certainly not looking for
7 dates and ranges right now. I recognize that there's so many
8 factors affected, and that's hard to do.

9 Just an observation, I would tell you, just with
10 the Court's own history in dealing with jury trials during the
11 pandemic circumstances, I'm really only looking at criminal
12 cases. It seemed that we had less problems earlier in the
13 summer, but waiting until summer as I look back at those
14 cases, but that may just be circumstance, I don't know.

15 So give it some thought, let the Court know.
16 We'll take it from there. I will certainly entertain your
17 findings and conclusions.

18 I appreciate the professionalism I've seen
19 throughout this trial, on behalf of the witnesses as well, and
20 we'll decide this matter as quickly as we can expeditiously do
21 so.

22 MR. ISAACSON: Thank you, your Honor.

23 MR. VANDEVELDE: Thank you, your Honor.

24 THE COURT: All right. Thank you very much.
25 That will complete this matter as far as evidence and argument

1 is are concerned, and I want to thank you once again, and
2 you'll be excused at this time, and court will be adjourned.

3 (The proceedings were adjourned.)

4 -o0o-

5
6 I certify that the foregoing is a correct
7 transcript from the record of proceedings
in the above-entitled matter.

8 /s/Margaret E. Griener 9/29/2021
9 Margaret E. Griener, CCR #3, FCRR
Official Reporter

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